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Supreme Court, U. S.
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IN THE

# Supreme Court of the United States

JANUARY TERM, 1974

No. A-519

JULIUS WEST
Petitioner,

vs.

UNITED STATES OF AMERICA
Respondents.

## PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE SIXTH CIRCUIT

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## OPINIONS BELOW

The Opinion of the Court of Appeals for the Sixth Circuit rendered on October 31, 1973, is not yet reported in the Federal Reports, Second Series. A copy of the slip Opinion filed with the Court is appended hereto as Appendix A.

Petitioner was convicted of bank robbery in violation of 18 USC Sec. 2113(a), of use of a firearm while in the commission of that same bank robbery in violation of 18 USC Sec. 924(c)(1), and of killing a bank employee in the course of the robbery, in violation of 18 USC 2113(e), following trial by jury in the United States District Court for the Western District of Michigan, which ended on May 12, 1972. On October 31, 1973, the United States Court of Appeals for the Sixth Circuit affirmed each conviction.

## JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. Sec. 1254(1).

## QUESTIONS PRESENTED

Petitioner is a negro male, 39 years old at the time of trial. During all of the time pertinent hereto, he resided at 812 West Lenawee, Lansing, Michigan, with his wife, Earline Peggy Ann West, and her son, Timmy Williams, age 16. Also living in the same apartment building but in another apartment were Petitioner's brother, Charles West, and his common-law wife, Pauline Rogers.

On January 10, 1972, the First National Bank of East Lansing, Michigan, was robbed of some $15,900 and the Branch

Manager, Stanley T. Irish, was shot and killed during the robbery. On the strength of the identification of a certain 1964 Ford Fairlane which was placed at the scene of the crime by at least one witness, the FBI and the local police focused their investigation of the crime on the inhabitants of the apartment building at 812 West Lenawee, Lansing, Michigan. After conducting an all-night surveillance of the apartment building on the night of January 10-11, the FBI and local police went to Petitioner's apartment, apartment 12, at approximately noon on January 11, for the purpose of obtaining Petitioner's consent to search his apartment. One of the FBI agents possessed a shotgun which he held in plain view in a "ready" position when his fellow agents, some seven or eight in number, knocked on Petitioner's apartment door. When Petitioner opened the door, he observed the agent with the shotgun pointed right at him, and responded affirmatively to the FBI's request that they be permitted to enter the apartment. The agent with the shotgun entered with his fellow agents. The agent in charge of the investigation advised Petitioner of his constitutional rights and requested that he consent to their search of his apartment, telling him that he might as well consent because if he did not do so, the FBI would obtain a search warrant. Petitioner gave his consent to the search and signed an instrument furnished him by the FBI indicating that his consent was voluntary. Evidence obtained during the search was admitted against Petitioner during the trial of this case.

On January 12, 1972, Special Agent Billy Yessick, in charge of the case for the FBI, filed an Affidavit before U.S. Commissioner Stephen W. Karr, seeking a search warrant. The Affidavit alleged many facts which were beyond the affiant's personal knowledge, facts which were hearsay as to him and, perhaps, as to the unnamed informant who furnished them to Yessick. The Affidavit also contained allegations conclusory in nature and recognized as such by the District Judge. In

addition, it contained facts acquired from an unnamed informant allegedly reliable whose reliability was highly questionable, and recognized as such by the Court. Finally, it contained allegations of fact as to the recovery of the items of evidence removed from Petitioner's apartment during the consent search.

Petitioner's motion to suppress the evidence obtained in the two searches was denied, and all of the evidence obtained therefrom was later used against him at the trial.

*The first questions presented to this Court are: Whether the search conducted under Petitioner's "Consent to Search" on January 11, 1972, was constitutionally valid or violated the Petitioner's Fourth Amendment rights; and Whether the search conducted under a search warrant which was predicated at least in part on the evidence obtained during the so-called consent search was a valid search or whether it infringed Petitioner's Fourth Amendment rights.*

In his opening statement, the United States Attorney for the Western District of Michigan advised the jury in considerable detail of the expected testimony of Petitioner's stepson, Timmy Williams. Williams' proposed testimony, if offered, would have been at least as damning as any other testimony in the trial, without any doubt. When Williams was called as the Government's second witness in the trial, early on the first day of the trial and only a few minutes removed from the U.S. Attorney's opening statement, he refused to answer any questions concerning the events of January 10, 1972, claiming his Fifth Amendment rights. The Court excused Williams from testifying at that time and appointed an attorney to represent him and to advise him of his rights and obligations.

The following day, the second day of trial, the Government, having obtained a grant of immunity from the Attorney General of the United States, recalled Timmy Williams to the witness stand over the objection of Petitioner's counsel. Wil-

liams' court appointed attorney advised the Court that his client would assert his privilege against self-incrimination if recalled to the witness stand. Notwithstanding, Williams was recalled and interrogated as to the events of January 10, 1972, about which the United States Attorney had earlier advised the jury he would be testifying. Williams persisted in declining to answer the prosecutor's questions except for a few of relatively little probative value, most of which were innocuous. At the conclusion of Williams' testimony, he was offered to defense counsel for cross-examination and there being nothing to cross-examine on, defense counsel declined.

*The questions presented are: Whether recalling witness Timmy Williams to the witness stand after he had already refused to testify and asserted his Fifth Amendment rights knowing that he intended to do so again, and with that knowledge interrogating the witness as to the events of January 10, 1972, in such a manner as to reinforce in the minds of the jury the Government's opening statement in which Williams' testimony had been outlined in detail, was so prejudicial as to be beyond correction by the Court; and Whether recalling witness Williams in the stated manner and under such circumstances deprived the defendant of his right to be confronted by and to cross-examine every witness called against him.*

## CONSTITUTIONAL PROVISIONS, STATUTES AND RULES INVOLVED

The constitutional provisions involved are the Fourth and Sixth Amendments to the Constitution of the United States.

## STATEMENT OF THE CASE

On January 10, 1972, the First National Bank of East Lansing, Michigan, was robbed of some $15,900, and the Branch Manager, Stanley T. Irish, was shot and killed during the robbery. The only eyewitness to the robbery and murder was Mrs. Mary Burnham, who identified the person who held up the bank and shot Irish as a male posing as a female. (Tr., p. 23)* Witness Larry Gerstenhaber placed a Ford Fairlane automobile, badly in need of repair, in the bank's parking lot at or about 1:50 p.m., the approximate time of the robbery-murder, with two black occupants in that automobile. (Tr., p. 116) The automobile in question was subsequently identified as being titled in the name of Earline Peggy Ann West, Petitioner Julius West's wife. (Sup. Tr., p. 45)

During the course of the robbery, Irish and the hold-up "man" engaged in a struggle, (Tr., p. 25), during which a button was torn off the black and green tweed coat the hold-up "man" was wearing, and an earring, distinctive in character, was torn off "his" ear. The button and earring were found at the scene of the crime during the ensuing police investigation. (Tr., pp. 185-188) Also found was a spent revolver bullet (Tr., p. 189), subsequently identified as coming from a gun owned by Charles West, Petitioner Julius West's brother. (Tr., p. 258)

It was the distinctive character of Earline West's automobile which made identification of that automobile relatively

* Legend: Tr., Trial Transcript; Sup. Tr., Motion to Suppress Transcript; App., Appendix.

easy, (Tr., p. 383) (Sup. Tr., p. 44) and as early as the evening of January 10, 1972, the investigation of the robbery-murder had focused on Apartment 12 at 812 West Lenawee, Lansing, Michigan, the residence of Julius West and his wife, Earline. (Tr., p. 384) Charles West was manager of that apartment building and also resided therein. (Tr., p. 82) On January 11, the next morning, the FBI and local police went to the West residence for the purpose of obtaining Petitioner's consent to search his apartment. (Tr., pp. 160-163) The FBI had earlier contacted the United States Attorney for authority to obtain a search warrant covering that apartment, and had been insructed by him that there were not enough facts pointing toward probable cause to justify the issuance of a search warrant, and it was for that reason that the authorities tried to obtain Petitioner's voluntary consent to search the apartment in question. (Sup. Tr., p. 46).

The FBI and local police, approximately eight in number, arrived at Petitioner's apartment at approximately noon on January 11, 1972. One of the agents of the FBI brandished a shotgun outside the door of the apartment. (Sup. Tr., pp. 58, 70, 74) Another agent knocked on the door, which was answered by Petitioner. The agents identified themselves and moved into the apartment, the gun pointing at Petitioner's stomach. One of the agents directed Petitioner to go into the kitchen of the apartment so that they could talk, which he did. It was suggested by the FBI that they were there because of the bank robbery which had occurred the preceding day and they requested Petitioner's permission to search his apartment, stating that if he did not voluntarily consent to search, they would obtain a search warrant which would simply take a little longer. (Sup. Tr., p. 59) Petitioner, not wanting to argue with the FBI in the face of the shotgun which was openly exposed to him, gave the police the authority to search his apartment. During the search, Petitioner's wife, Earline, came into the apartment carrying two or three bags of gro-

ceries, which she put down on the floor of the kitchen. Earline inquired as to what was going on and Petitioner told her that the FBI was searching their apartment and that it had something to do with the bank robbery the day before. With that, one of the agents of the FBI took Earline aside and said something to the effect that they wanted her to take them over the route she had taken the day before, whereupon she and that agent left the apartment. (Tr., pp. 170, 171) (Sup. Tr., p. 62) Petitioner then realized something was wrong and demanded that the search then being conducted be terminated. (Tr., p. 171) There was some discussion between Petitioner and the FBI as to his earlier "consent", but the agent in charge of the investigation, Billy Yessick, called off the search and instructed his fellow officers to leave the apartment. Taken at that time were a button, which in many respects matched the button found at the scene of the crime, and a spool of beige thread, which in some respects matched a piece of thread found on the earring recovered at the bank. (Tr., pp. 160, 167).

Approximately one hour later, the FBI returned to Petitioner's apartment to transport him downtown for purposes of a lineup. (Tr., p. 164) When they returned, the FBI found Petitioner lying down and in obvious pain. It was necessary that they assist him in getting dressed to leave the apartment, and they had to almost carry him down the steps of the apartment to a waiting automobile. The FBI took him to the Lansing City Jail where he was held for a period of time, (Tr., 164, 165) and then they took him to the Ingham County Jail in Mason, Michigan, where a lineup was conducted later on that afternoon or early evening. (Tr., p. 412) Mrs. Burnham was one of the witnesses to the lineup and was unable to identify anyone in the lineup as the bank robber who had shot and killed Stanley Irish. (Tr., p. 38-40) Petitioner and the others in the lineup were taken from the lineup room and brought into a large open room where they were confronted

on a face-to-face basis by Mrs. Burnham, and again Mrs. Burnham failed to identify Petitioner as the bank robber-murderer. (Tr., p. 38-40)

Petitioner was held in jail on a traffic violation from that point on until his arrest for the offenses in question here on January 13, 1972. Meanwhile, the FBI spoke to several of the tenants in the apartment house at 812 West Lenawee, including Timmy Williams, (Sup. Tr., p. 52) stepson of Julius West and the son of Earline West, and Pauline Rogers, common-law wife of Charles West. The FBI learned from Williams that his stepfather and mother had returned home at approximately 2:30 or 3:00 p.m., on Monday, January 10, and that at that time Petitioner was dressed as a woman, wearing an afro wig, earrings, a brassiere, and a green and black tweed coat which belonged to his wife. Williams also told the FBI that he heard his stepfather inquire of his mother, "Did we get any one's?" He also heard his mother's reply: "We got lots of one's." (Tr., pp. 193-196) In the course of their investigation, the FBI also found parts of an afro wig cut up and hidden in Williams' tennis shoes hidden in his locker at Lansing Sexton High School. (Tr., pp. 221-223)

On the strength of what the FBI learned from Timmy Williams and from an unidentified informant who had been working with the Lansing police, and from the "consent search" on January 11, 1972, Special Agent Yessick sought a search warrant for apartment 12 at 812 West Lenawee. He filed an Affidavit setting forth those things that Williams had told the FBI about his mother's and stepfather's participation in the crime, and those things that the FBI learned from the unidentified informant regarding the alleged hiding place of the money taken from the bank. Certain other allegations were also made in the Affidavit. A search warrant was issued and on January 12, 1972, a search of Petitioner's apartment was conducted pursuant to that warrant. Taken at that time were hair fibers from a cardboard box in an interior hallway

in the apartment, which matched the hair fibers in the cut up afro wig (Tr., p. 248), and a Christmas tree shaped rhinestone clip from Earline West's jewelry box, which matched a rhinestone clip which was a part of the earring found at the bank. (Tr., pp. 246)

Subsequent thereto, the FBI interviewed Pauline Rogers, (Tr., p. 247) a woman living with Charles West, Petitioner's brother, in apartment 6. Mrs. Rogers told the FBI that Petitioner had come to Charles West's apartment on the night of the bank robbery carrying handsful of money, claiming to have robbed the bank in question that afternoon and claiming to have shot the Branch Manager. (Tr., pp. 59, 60) Pauline Rogers described in some detail her further conversations with Petitioner and Earline West that evening, and the manner in which Charles West became involved in trying to secrete the money taken from the bank. Pauline Rogers also described her efforts to hide the black and green tweed coat and to get rid of the gun used in the robbery. Through Pauline Rogers, the FBI recovered both the coat and the gun. (Tr., pp. 247, 62, 63, 92-95)

Petitioner was indicted in three counts by the Grand Jury, to each of which he stood mute, a plea of not guilty being entered. Prior to his trial, which commenced on May 8, 1972, he filed a Motion to Suppress the evidence taken from his apartment on January 11, 1972, pursuant to his consent to search, and on January 12, pursuant to a search warrant. His Motion to Suppress was denied. (Sup. Tr., pp. 79, 108) At the trial, objection to the admission of those items recovered during the two searches was made on the basis that the consent to search had not been given voluntarily and that the search warrant had been issued on the basis of an Affidavit which was insufficient to establish probable cause. (Tr., p. 382)

In the Government's opening statement at the trial, the

United States Attorney described in considerable detail the testimony that Timmy Williams was expected to give, specifically all that relating to his own observations of his mother's and stepfather's appearances and activities on the afternoon of January 10, 1972. (Tr., pp. 8-10, 12, 13) When Williams was called as a witness early in the trial, he refused to testify and asserted his Fifth Amendment right not to incriminate himself. (Tr., pp. 45, 47) The Court was concerned that Williams, being only sixteen years old, might not fully understand what his rights were and appointed an attorney to represent him. (Tr., p. 49) Williams was withdrawn as a witness before any of his expected testimony was given to the jury. Subsequent thereto, the United States Attorney obtained an order from the Attorney General of the United States granting Williams immunity if he testified against himself in his stepfather's trial. (Tr., p. 197) *Notwithstanding that Timmy Williams' attorney advised the court and the United States Attorney that his client was still reluctant to testify and would be claiming his Fifth Amendment rights if he were compelled to testify,* (Tr., p. 201, 211, 212) *the United States Attorney, with the approval of the Court and over the objection of Petitioner, recalled Williams to the witness stand.* (Tr., p. 214) Timmy Williams did answer a few innocuous questions, but refused to answer anything which was pointed directly toward his stepfather's and mother's participation in the events of January 10, 1972. (Tr., pp. 214-223) At one point, under the examination of the United States Attorney, he broke down and cried, (Tr., p. 223) and it was necessary for the Court to recess to permit him to regain his composure. At the conclusion of that recess, *the Court permitted the United States Attorney to resume his questioning of Timmy Williams* concerning those things that the United States Attorney had told the jury in his opening statement the boy would be testifying to. (Tr., pp. 224-226) Timmy Williams never did testify to the facts as set forth by the United States Attorney in his opening statement. When the witness was offered for cross-

examination, the defense declined, there being nothing except Williams' refusal to answer questions to cross-examine on.

At the conclusion of the Government's case, Petitioner moved for a mistrial on the basis of the Government's opening statement and Timmy Williams' refusal or failure to testify to those matters to which the Government had referred in that statement, arguing that the prejudicial effect of the Government's opening statement was so significant as to be beyond correction by the Court. (Tr., p. 385) The Motion for Mistrial was denied. (Tr., p. 392)

Julius West took the stand and testified in his own behalf. He stated that on January 10, 1972, he had been sick from an arthritic spinal condition and had remained home alone and in bed all day (Tr., p. 395), that his wife may have left the apartment that morning, but that when he awoke at approximately 3:30 p.m., she was home. (Tr., p. 398-9) He stated that he learned of the bank robbery on television, but claimed to have no other knowledge of the facts regarding the robbery. He identified the black and green tweed coat as his wife's but said that he believed she had not been wearing it and that it had been stored in the basement of the apartment building. (Tr., p. 415) He testified that on January 11, 1972, the FBI came to his apartment brandishing a shotgun, and rather than argue with the police, he let them search the apartment (Tr., p. 402) until he heard one of them tell his wife to take them over the route she had taken the preceding day, at which point he felt uneasy and asked the FBI to leave, which they did ten minutes later. (Tr., p. 406)

Petitioner then described how the FBI came back a short time later and took him downtown for a lineup, how he was then held on a traffic warrant, and how it wasn't until two days later, January 13, 1972, that he was arrested and charged with bank robbery and murder. (Tr., p. 411)

At the conclusion of the case, after closing arguments, the Court gave an instruction to the jury covering Timmy Wil-

liams' reluctance to testify and the credibility that the jury had a right to attach to those matters to which he did testify, and specifically instructing the jury that as to those matters that he refused or failed to testify to, they should not speculate. (Tr., p. 546)

The jury found Julius West guilty on all three counts of the indictment. Subsequently, on Count 1, bank robbery, he was sentenced to 20 years in prison; on Count 2, the commission of a homicide in the perpetration of a bank robbery, he was sentenced to life in prison; and on Count 3, the possession of a weapon during the perpetration of a bank robbery, he was sentenced to 10 years in prison, the sentences to run concurrently.

## REASONS FOR GRANTING THE WRIT

### CONFRONTATION OF WITNESSES

The United States Attorney, in his opening statement to the jury, made a detailed summary of the evidence he expected from Timmy Williams, the stepson of Julius West:

> "And we will also show you that a young man by the name of Timothy Williams – he is the stepson of Mr. Julius West, who will tell you that on January 10 – incidentally, that day of the week was a Monday – who will show that although he was a student in Lansing High School in Lansing, Michigan, he did not attend school that day; that he was living with his mother, who is the wife of Mr. Julius West, and that they were living at an address at 812 West Lenawee Street in the City of Lansing, in Apartment 12, and that on the day in question, that is, January 10, we will show by evidence from Mr. Timmy Williams that he was home that day, that he was home that day after 2:00 o'clock in the afternoon, and that he was home when his mother and stepfather re-

turned from that horrible tragedy. We will show by his testimony that, and he will so-testify, his stepfather came into the door, that he had part of an earring in his ear, that he had over his arm a woman's coat, salt and pepper-type coat with a fur collar. We will show you by his testimony that Mr. Julius West and his wife went into the bedroom, that shortly thereafter, Mr. Julius West came out undressed and went in and took a cold shower. While he was in the shower, he yelled back to his wife, 'Did we get any 1's,' and that Earline, his mother, called back and said, 'Yes, we got a lot of 1's.'

"You will hear the testimony from this young man that the coat in question was one that he recognized as belonging to his mother. . . . (App. B., p. 63)

"You will see that the plan in this case by Mr. Julius West and, indeed, by his wife, although we are not trying her, was that he tried to hide, so to speak, or he tried to distinguish himself not as a man, but as a woman. We will show you that he had a headpiece on, as an example, which was an Afro-type headpiece, and that he wore it that day. That he even went so far as, we'll show by the witnesses, to wear a bra. And that when he returned home, Timmy Williams will tell you that one of the first things he did, upon request of his stepfather, was to release and unlock the bra which he had on. . . . (App. B., pp. 63, 64)

This summary of Timmy Williams' expected testimony takes up approximately two of the eight transcript pages of opening statement. When Williams was called as the Government's second witness the jury was excused at the request of the defense counsel. The witness stated to the court that he would not answer questions and that he had not told

the United States Attorney that he was willing to testify in the case. (App. B., p. 64) Williams was allowed to step down and the trial continued. The court appointed counsel for Williams. (App. B., p. 65) The trial court recognized that the matters which Williams would testify to could be critical. (App. B., p. 65) The court indicated its concern for "the question of . . . whether or not if he (Williams) refused to testify, the opening statement, which included his expected testimony as narrated by the U.S. Attorney, could be deemed as prejudicial error when such testimony was not forthcoming on the trial." (App. B., p. 66) The trial court also made note of defense counsel's reservation of the right to move for dismissal at the conclusion of the proofs if they did not contain the facts narrated in the opening statement. (App. B., p. 67)

The United States Attorney read into the record, out of the presence of the jury, a statement signed by Williams on January 14, 1972, which contained essentially the facts narrated by the United States Attorney in his opening statement. (App. B., pp. 67-70) The United States Attorney then informed the court that he had applied for an immunity order for the witness Williams in conformity with the statute, 18 U.S.C. 2514. (App. B., p. 70, 71) The court read the contempt provision, 28 U.S.C. 1826(a), to the witness. (App. B., p. 71) The court told the witness that when he was again called to the stand, and if the court determined that the questions were proper and within the immunity granted, then he would order the witness to answer the question. (App. B., pp. 72, 73)

When defense counsel learned that the U.S. Attorney intended to ask Timmy Williams questions in the presence of the jury, rather than out of the presence of the jury as originally suggested, he made the following objection:

> "Then I have this observation to make, your Honor, that 'I am caught somewhere between the devil and the deep blue sea', having heard Mr. Williams' statement to

the two FBI Agents read, anticipating what he might testify to if he elects to testify. I am frank to acknowledge I don't want the jury to hear that. On the other hand, I don't want the jury to hear him sit on the witness stand and take the Fifth Amendment question after question; then ask themselves, as indeed they must, 'Why is this witness claiming the Fifth Amendment,' and having been advised that he doesn't have a Fifth Amendment right by the court, why does he continue to refuse to answer the questions and place himself in contempt of court, unless it is for either of two reasons, either he doesn't want to testify against his stepfather, and therefore his stepfather must be guilty, or he is afraid of his stepfather. And some conclusion might be drawn from that, that his stepfather might be guilty.

"So I object to the whole procedure at this point, knowing in advance that the witness has indicated he will not answer the questions and his doing so being prejudicial to the rights of the defendant." (App. B., p. 73)

The court overruled the objection on the basis of *United States v. Compton* (CA 6th, 1966), 365 F2d 1, citing as the distinguishing factor in that case, " 'Counsel from the beginning treated this witness as a hostile witness under cross-examination. His approach to questioning the witness was improper. The witness was called by the Government and if he had knowledge pertinent to the issues counsel should have brought it out by direct questions without reference to the statement given to the FBI. . . .' " (App. B., pp. 73, 74) Defense counsel continued to assert the prejudicial effect of calling a witness knowing that the privilege would be asserted. (App. B., pp. 74, 75) The court, however, terminated his argument. (App. B., p. 75) Before the jury was called in, the witness, through his counsel, again indicated his intention not to testify. (App. B., p. 76)

The jury was called in and the following testimony took place:

"...

"Q. Do you remember whether on the morning of January 10, your stepfather, Julius West, and your mother, were also there in the apartment?

"A. Yes.

"Q. They were?

"A. Yes.

"Q. Do you recall whether sometime after 12:00 o'clock noon, whether your stepfather and mother left the apartment?

"A. No.

"...

"Q. Do you know whether they left the apartment at all on January 10, whether in the morning or in the afternoon, sir?

"A. I would rather not answer that question.

"The Court: You will have to answer, witness, if you know.

"A. (No response)

"The Court: Perhaps the Reporter should read the question.

(Last question was read back by the Reporter)

"A. (No response)

"Q. Do you understand the question, witness?

"A. I understand the question.

"Q. Do you understand the instructions just given to you by Judge Engel?

"A. I do.

"Q. Do you refuse to answer that question?

"A. Just the answer I gave you.

"The Court: Sir?

"The Witness: Just the answer I gave him.

"Q. But the Court has instructed you to answer.

"A. I know that.

"Q. But you still refuse?

"A. Yes.

"Q. Let me ask you this question, did your father, stepfather, Julius West, leave the apartment some time on the morning before noon on January 10, 1972?

"A. I cannot answer that question, either.

". . .

"Q. During that time did Julius West have a mustache and a goatee?

"A. I wish not to answer that question.

"Q. I'm sorry, I didn't get your answer?

"The Court: He said, 'I wish not to answer that question.'

"Mr. Milanowski: I would respectfully request the Court to order him to answer it.

"The Court: Timothy, I order you to answer that question.

"A. And I wish not to answer the question. Your Honor, I wish not to answer it.

(Government's Exhibit 13 was marked by the Reporter)

"Q. Mr. Williams, I am going to show you what has been marked as Exhibit 13 and ask you whether you had ever seen that Exhibit on January 11, 1972?

". . .

"Q. Okay. Did you ever see those parts of a wig on January 11, the morning of January 11, 1972?

"A. I wish not to answer that question, either.

"Mr. Milanowski: Your Honor, I would respectfully request the Court to instruct him to answer.

"The Court: Yes, I order you to answer that.

"The Witness: Your Honor, I wish not to answer the question.

"Q. Mr. Williams, isn't it true that you took this wig or the parts of it to your locker at Lansing Eastern High School on the morning of January 11, 1972, in your tennis shoe? Is that true, sir?

". . .

"Q. Well, let me strike that. Did any of the FBI agents or anyone else contact you regarding this wig?

"A. Yes.

"Q. And when was that?

"A. The night after they had 'tore up our house'.

"Q. And what did you say to them?

"...

"(A brief recess was then taken)

"(Court was resumed after a 15 minute recess, the jury not yet having been returned to the courtroom)

"The Court: The record should show that –

"Mr. Milanowski: Did the Court want to say this outside of the jury, your Honor?

"The Court: Yes, outside of the jury. The record should show that at the time of the recess the witness was weeping, and for that reason the Court sent the jury to the jury room and called a recess...."

"...

"The Court: Well, let's call the jury in.

"Do you think you can go on now, Mr. Williams? How are you doing?

"Q. In the afternoon, January 10, do you remember your father coming home with a green coat that I showed you at approximately 2:30 or 3:00 o'clock?

"A. No, I don't.

"Q. Do you remember whether he came home at that hour on the same day, and that he was wearing a bra?

"A. No, I don't.

"Q. Do you recall that on that same day he went into the bedroom and he asked you to unzip the bra?

"A. No, I don't.

"Mr. Eardley: Your Honor, may we approach the bench?

"The Court: Yes.

(A conference was held at the Judge's bench.)

[Defense counsel objected, outside the hearing of the jury to avoid creating an even greater impact, that these questions were improper under *United States v. Compton, supra.* The U.S. Attorney agreed to ask no further questions.]

(App. B., pp. 76-83)

Defense counsel elected not to cross-examine Timmy Wil-

liams (App. B., p. 83) because, first of all, there was nothing to be learned from a witness who refused to answer relevant questions, as he had already done, and, secondly, because to have cross-examined under those circumstances would only have more firmly implanted in the minds of the jurors the very prejudice the defense sought to avoid by its objection to Williams' recall as a witness in the first instance. In addition, the exercise of the right of cross-examination by the defense would have added sufficient dignity to the direct examination so as to impute the defense's approval of the Government's decision to recall the witness, notwithstanding its objection.

Defense counsel made a timely motion for mistrial. (App. B., p. 98)

The defendant's motion for mistrial was denied (App. B., p. 98)

During his closing argument the United States Attorney made the following remarks regarding Williams' testimony:

> "Now, you heard the testimony of Timothy Williams, and he stated that someone put the wigs in his tennis shoes. Isn't that true? No question about that part, someone put the wig in his tennis shoes, and when Special Agent Hildreth went on the stand, he testified that is exactly where he found those, that part of the wig. But, again, the amazing thing, it all fits in. And why do I say that? Because even outside of that direct evidence, it seems to me, by Timothy Williams who said that someone put those in his tennis shoes when he went to school the next day, we have other supporting evidence which puts it there. . . .
>
> ". . .
>
> ". . . What about the wig? Here is the wig, and we got — it came from the apartment, there is no question about that, is there, for two reasons? Timmy's testimony and the fact we found the box with fibers. . . .
>
> ". . .
>
> ". . . And I'm not mentioning anything at all about

Timmy Williams, you heard that testimony; . . ." (App. B., pp. 83, 85)

The court gave the following instruction to the jury regarding the opening statement of the United States Attorney and the testimony of Williams:

> "Without intending to give undue emphasis to the testimony of one witness over another, I feel it appropriate to make a few remarks about the testimony of Timothy Williams. You will remember that at the beginning of the trial, I stated that no remarks of counsel could be received by you as evidence. During his opening statement the United States Attorney in outlining the witnesses and expected testimony, made certain remarks as to the expected testimony of Timothy Williams.
>
> "You will recall Timothy Williams testified with great reluctance and in some instances declined altogether to answer questions. While you are entitled to and should subject those matters to which he did testify to the same rules as I have already explained concerning all witnesses, and while you may consider his apparent reluctance as bearing upon his credibility and what weight you will give to his testimony this does not justify you in speculating and you may not speculate as to what his answers would have been to questions put to him where he refused to answer.
>
> "Likewise, I charge you to disregard absolutely any statement made by the United States Attorney at the beginning of the trial concerning the testimony of Timothy Williams which he did not actually testify to during the trial." (App. B., p. 85)

The United States Attorney in this case outlined evidence to the jury in his opening statement which he claimed would be placed in evidence by his witness, Timmy Williams. Williams did not so testify. Similar assertions of error have been dealt with in a number of cases. The courts have dealt with

these assertions of error on one or both of two possible legal theories: (1) as prosecutorial misconduct; (2) as a denial of the defendant's right to confrontation of witnesses against him under the Sixth Amendment. The prosecutor's good faith or lack of good faith is the controlling issue where there is an assertion of prosecutorial misconduct; however, the prosecutor's good faith, or lack of it, is not controlling in determining whether defendant has been deprived of the right of confrontation guaranteed by the Sixth and Fourteenth Amendments. *Frazier v. Cupp* (1969) 89 S. Ct. 1420, 1423, 394 U.S. 731, 736, 22 L.Ed. 2d 864. Defense counsel agreed during the trial that the prosecutor in good faith reasonably expected to produce the evidence which he summarized in his opening statement to the jury. There is no claim, therefore, of prosecutorial misconduct in the opening statement. Neither is there any claim of error in calling Timmy Williams as a witness *the first time he was called*, when the prosecutor had reason to believe he would support his opening statement. But when he called Williams the *second* time, knowing he would not testify, reinforcing in the jury's mind by his line of questioning the promises of his opening statement, and when he later referred to Timmy Williams in his final argument, the prosecutor's good faith was overcome by his poor judgment, and there was nothing the trial court could do or say to correct it. These factors combined denied Julius West the right of confrontation guaranteed by the Sixth Amendment.

Numerous factors have influenced the courts' decisions where a deprivation of the right to confrontation has been alleged: Whether or not the contents of witnesses' statements and facts summarized have in fact been proved during trial: *United States v. Allegrucci* (CA 3d, 1958), 258 F2d 70; *United States v. Maxwell* (CA 2d, 1967), 383 F2d 437, cert. denied; *Aiken v. United States* 88 S.Ct. 786, 389 U.S. 1043, 19 LEd 2d 835; *Douglas v. Commissioner of Virginia* (DC Va, 1971), 327 F.Supp. 689; *United States v. Hines* (DC Pa,

1972), 336 F.Supp. 1034; *United States v. Villafana* (CA 5th, 1972), 455 F2d 478; *Cota v. Eyman* (CA 9th, 1971), 453 F2d 691; *People v. Gruca* (1971), 32 Mich App 195; Whether or not the opening statement indicated assertions of the prosecutor's personal knowledge to the jury: *Leonard v. United States* (CA 9th, 1960), 277 F2d 834; *Patriaca v. United States* (CA 1st, 1968), 402 F2d 314; Whether or not defense counsel objected: *United States v. Wallace* (CA 8th, 1972), 453 F2d 420; Whether or not the prosecutor engaged in subsequent conduct which emphasized the nonproven assertions in the opening statement: *Gladden v. Frazier* (CA 9th, 1968), 388 F2d 777, affirm. *Frazier v. Cupp* (1969), 89 S. Ct. 1420, 394 U.S. 731 22 LEd 2d 864; *Jones v. United States* (CA DC, 1964), 338 F2d 553; *Cota v. Eyman, supra;* Whether or not the prosecutor's statements were prejudicial to the defendant: *Kaufman v. United States* (CA 8th, 1969) 414 F2d 1022; *United States v. Woodring* (CA 10th, 1972), 446 F2d 733; *United States v. Cunningham* (CA 2nd, 1971), 446 F2d 194; *Gladden v. Frazier, supra;* Whether or not the nonproven statements in the opening statement had a tangible connection to the prosecutor's case: *Turner v. United States* (CA 5th, 1969), 415 F2d 1234; *United States v. Villafana, supra.*

In *Jones v. United States* (CA D.C. 1964), 338 F2d 553, the court reversed the defendant's conviction on facts similar to those here. In that case the prosecuting attorney told the jury that the Government's witness observed certain things, outlining the expected testimony in detail. When the Government's witness was called, the prosecuting attorney at several points assumed her opening statement of the expected evidence in questions to that witness. The witness denied the factual assertions. Although there was an instruction that the opening statement did not constitute evidence and although there was an instruction to disregard one of the questions, the court reversed the conviction, not being in a position to say "that the suggestion contained in the opening statement and

in the questions were not responsible in some degree at least, for the convictions in these cases." *Jones, supra,* 554.

In *United States v. Puco* (CA 2d, 1971), 436 F2d 761, the court reversed the defendant's conviction because the prosecutor, through the form of his questions, plainly represented to the jury that the witness had in fact made certain statements to him. In that case the witness had made a certain out of court statement to the prosecutor implicating the defendant. At the trial the prosecutor asked the witness a series of questions about his statement, each time saying "did you tell me" or "do you recall me asking you." The witness agreed to much of what was asked but denied each of several assertions involving the defendant. The court said:

> "Using this statement, which was never admitted into evidence against either defendant, in this way in effect placed the credibility of the prosecutor himself before the jury and was therefore highly prejudicial. The prosecutor by his reading from the purported statements and the form of his questions was plainly representing that Gonzoles had in fact made the statements to him." *Puco, supra,* 1762.

In the present case the combined effect of the prosecutor's detailed narration of what Timmy Williams' testimony would be, plus his leading questions which asserted the very facts which he told the jury the boy would testify to, when he knew when he recalled Williams as a witness that he would not testify, in the light of Williams' emotional breakdown and the orders of the court for him to testify, was a plain representation by the United States Attorney that Williams had in fact made such statements or given such testimony at an earlier time.

In *United States v. Jenkins* (CA 5th, 1971), 442 F2d 429, a witness had agreed to testify before the trial started and the prosecutor in reliance on this assurance made certain statements to the jury in his opening argument. Subsequently,

however, the witness indicated he would refuse to answer any questions on the ground it might incriminate him. The trial court ruled that the Government could make the witness claim the privilege in front of the jury one time and this subsequently occurred. The court on appeal held that this *one episode in the course of a very lengthy trial* did not prejudice the appellant and therefore affirmed his conviction.

In *Cota v. Eyman* (CA 9th, 1971), 453 F2d 691, the prosecutor in his opening statement to the jury mentioned a witness Valenzuela 18 times, linking him with the appellant in the murder and referred to certain conversations between Valenzuela and the appellant. He then called Valenzuela to the stand knowing beforehand that he would take the Fifth. The court affirmed the appellant's conviction but rested its decision on the following factors: The prosecutor did not represent to the jury that Valenzuela would testify to the details stated in his opening statement. Moreover, he made good the portions of his statement complained of, including the conversations by the testimony of two other witnesses. The court said, however:

> "More troubling is the requiring of Valenzuela to take the Fifth with prior knowledge that he would do so."

The only questions asked of Valenzuela before the jury, in addition to his name, age and length of residence in Arizona, were whether he knew appellant, his acquaintance with two other key prosecution witnesses, and where he lived at the time of the murder. He was then excused. The court relied on several factors in reaching its decision of affirmance: There was no attempt by the prosecuting attorney to get before the jury a statement previously made by the witness through the use of questions. The only reference made in the closing argument to the witness' refusal to testify was, "Pedro Valenzuela who refused to testify." Defense counsel did not ask for curative instruction.

> "No 'critical weight' was added by the summoning of

> Valenzuela to the prosecution's case in a form not subject to cross-examination. The testimonies of Pino and Osorio which covered appellant's admission and his conspiracy with Valenzuela were other sources of the inference created by Valenzuela's refusal to testify that he had had a part in the crime with appellant." *Cota, supra,* 695

Here, however, the United States Attorney made a clear statement to the jury in his opening statement that the witness would testify as to certain facts. His questions to the witness in conjunction with his opening statement made a clear inference to the jury that certain statements had been previously made by the witness, and defense counsel did make a strong objection. "Critical weight" was added by the summoning of Timmy Williams because there was no other testimony, other than the statements of the United States Attorney in his opening statement, that Williams was involved with his stepfather in the crime, that his stepfather came into the house wearing a bra, and that his stepfather said "Did we get any 1's," etc. Circuit Judge Browning in his dissent in *Cota v. Eyman,* said:

> "The state's insistence upon calling Valenzuela in the face of the strong opposition of defense counsel and the evident reluctance of the trial judge belies the state's present position that calling Valenzuela was an empty ritual. To the contrary, the state's trial attorney considered the exercise of the state's 'right' to require Valenzuela to claim the privilege before the jury vitally important to the state's case. The reason is clear enough.
>
> "The jury was unlikely to credit such interested and dubious witnesses as Osorio and Pino. Yet the state's case rested entirely on their testimony. If Valenzuela remained silent on the ground that his testimony would incriminate him, the jury would inevitably infer that had he testified he would have admitted the acts and statements damning equally to petitioner, that Osorio and

> Pino had described. The inference the jury would inevitably draw from Valenzuela's refusal to testify would corroborate the testimony of the state's key witnesses and bolster their credibility." *Cota, supra,* 696.

The only other witness in the trial who directly linked Petitioner to the crime was Pauline Rogers, a witness of highly doubtful character and credibility. Timmy Williams' testimony became important not only because it directly implicated Julius West, but also because it lent credibility to Mrs. Rogers' testimony, testimony the jury might well have rejected otherwise.

In *Gladden v. Frazier* (CA 9th, 1968), 388 F2d 777, affirmed, *Frazier v. Cupp* (1969, 89 S. Ct. 1420, 394 U.S. 731, 22 L. Ed. 2d 864, the prosecutor in his opening statement to the jury stated that he expected Rawls to testify to the commission of the crime and recited what Rawls' testimony would be. When Rawls was called to the witness stand he claimed the privilege against self-incrimination and refused to answer the prosecutor's questions. The trial judge sustained his claim of privilege and the witness Rawls left the stand. The prosecuting attorney, in the course of a lengthy trial made no other reference to any statement made by Rawls. The Court of Appeals said, "The controlling question should be the good faith or lack of good faith of counsel in saying what he said in his opening statement and the likelihood that the opening statement was unfairly prejudicial to the defendant." *Gladden, supra,* 779. The Court of Appeals found that the prosecutor acted in good faith in expecting that the witness would testify. The court said:

> "The fact that Rawls' expected testimony, once it became unavailable, was never again mentioned in the extended trial is of some significance on the question of the prosecutor's good faith, *and of great significance on the question of the prejudicial effect of the opening state-*

*ment and the calling of Rawls to the stand." Gladden, supra,* 780. (Emphasis added)

Here, Timmy Williams' expected testimony was mentioned inferentially by the United States Attorney's questions, in his closing argument, and in the jury instructions.

The court also relied on the fact that "Rawls was on the witness stand only momentarily, and neither by question nor answer was anything which was contained in his confession brought to the attention of the jury." Here, Timmy Williams was on the stand for a long period, and the United States Attorney's questions to him clearly brought to the attention of the jury the elements of his statement which had been outlined in the opening statement.

This Court on review of *Frazier* agreed with the Court of Appeals' factual determination as to the prosecutor's good faith on the question of prosecutorial misconduct. However, this Court said: "... We do not believe that the prosecutor's good faith, or lack of it, is controlling in determining whether a defendant has been deprived of the right of confrontation guaranteed by the Sixth and Fourteenth Amendments..." *Frazier v. Cupp, supra,* 1423. In affirming the lower Court's decision, this Court cited the fact that Rawls' appearance could not have lasted more than two or three minutes. The Court also said:

> "Here, Rawls was on the stand for a very short time and only a paraphrase of the statement was placed before the jury. This was done not during the trial while the person making the statement was on the stand but in an opening statement." *Frazier, supra,* 1423.

In the instant case, Williams was grilled for a considerable time in front of the jury, broke down weeping, and was again called back to face leading questions which clearly accused him of withholding information.

The Supreme Court also said:

> "Moreover, unlike the situation in either *Douglas* or

*Bruton*, Rawls' statement was not a vitally important part of the prosecution's case." *Frazier, supra*, 1423.

Petitioner respectfully suggests that Williams' "testimony" offered under the circumstances that existed at the time was "a vitally important part of the prosecution's case" and that its harmful and prejudicial effect on the jury, while immeasurable, cannot lightly be disregarded. The prosecutor had to have a reason for recalling Williams to the stand when he knew, and had been so advised by Williams' attorney, that Williams would not answer his questions. No other reason can be offered except that he wanted Williams' "performance", a performance he had been told he would get, to shore up his otherwise largely circumstantial case. The Court of Appeals' reliance on *Frazier* (App. A, pp. 7-8) equates the prosecutor's good faith in making his opening statement, which Petitioner does not dispute, with his good faith in recalling Williams to the stand under circumstances which could only prejudice the jury and deprive the defense of its right to be confronted by and to cross-examine every witness called by the prosecution.

The Government introduced no evidence to show that Timmy Williams, in fact, saw or did the things about which he was recalled to testify. No witnesses testified that they saw Williams greet his stepfather impersonating a woman on that afternoon, or witnessed him overhear his stepfather's admission of guilt, or witnessed his taking the wig parts in his tennis shoe to school, or witnessed him helping his stepfather out of the bra. The jury knew, however, that Timmy Williams had talked to the FBI. They heard the United States Attorney in his opening statement say that Timmy Williams would testify to these facts. The clear inference to the jury, therefore, was that he had, in fact, made these statements at a prior time and was now refusing to answer or acknowledge any of these statements or facts to protect his parents.

Had the prosecution and court gone no further with Williams than to excuse him when he first asserted his Fifth

Amendment rights, the circumstances before the court in *Frazier* might control, and the Court of Appeals' reliance on *Frazier* here would be better understood. But the prosecution went much further. It placed before the jury the traumatic and repeated unfolding of an inescapable fact that Timmy Williams had previously told the United States Attorney and/or the FBI that he could testify to the identity of the murderer, to an admission of guilt by the murderer, and to the attempt by the murderer to conceal evidence. In spite of obvious conferences outside the hearing of the jury, strong pressure by the United States Attorney and repeated and forceful orders to testify by the court, the boy refused to answer to the point of breaking down and weeping on the witness stand, only to be ordered back by the court for more questions which amounted to nothing less than accusations of his knowledge of incriminating evidence.

The Court of Appeals' reliance on *Frazier v. Cupp, supra,* clearly distinguishable factually, is therefore misplaced.

A somewhat more blatant form of conduct caused reversal of the conviction in *Douglas v. Alabama* (1965) 380 U.S. 415, 85 S.C. 1074, 13 L.Ed. 2d 934. In that case the defendant's alleged accomplice, Loyd, had been tried and found guilty. He was called as a witness against the defendant but refused to answer, relying on his privilege against self-incrimination, even though the trial judge refused the privilege and ordered him to answer. He was declared a hostile witness and the solicitor was given the privilege of cross-examination. Under the guise of cross-examination to refresh Loyd's recollection, the solicitor purported to read from the document, pausing after every few sentences to ask Loyd in the presence of the jury, "Did you make that statement?" Each time, Loyd asserted the privilege and refused to answer, but the solicitor continued his form of questioning until the entire document had been read. Three witnesses identified the document which the solicitor had read as the confession made and signed by

Loyd. However, the document was never offered in evidence. This court held that the defendant was deprived of his right of confrontation under the Sixth Amendment, saying:

> "Although the solicitor's reading of Loyd's alleged statement, and Loyd's refusals to answer were not technically testimony, the solicitor's reading may well have been the equivalent in the jury's mind of testimony that Loyd in fact made the statement; and Loyd's reliance upon the privilege created a situation in which the jury might have properly inferred both that the statement had been made and that it was true."
>
> "In the circumstances of this case, petitioner's inability to cross-examine Loyd as to the alleged confession plainly denied him the right of cross-examination secured by the Confrontation Clause. Loyd's alleged statement that the petitioner fired the shotgun constituted the only direct evidence that he had done so; coupled with the description of the circumstances surrounding the shooting, this formed a crucial link in the proof both of petitioner's act and of the requisite intent to murder.
>
> "Although the solicitor's reading of Loyd's alleged statement, and Loyd's refusals to answer were not technically testimony, the solicitor's reading may well have been the equivalent in the jury's mind of Loyd's reliance upon the privilege created a situation in which the jury might have properly inferred both that the statement had been made and that it was true. (Citations omitted). Since the Solicitor was not a witness, the inference from his reading that Loyd made the statement could not be tested by cross-examination. Similarly, Loyd could not be cross-examined on a statement imputed to but not admitted by him." *Douglas, supra,* 13 L.Ed. 2d 934, 937, 938.

Later, this Court stated:

> "... effective confrontation of Loyd was possible only

if Loyd affirmed the statement as his. However, Loyd did not do so, but relied on his privilege to refuse to answer. We need not decide whether Loyd properly invoked the privilege in light of his conviction. It is sufficient for the purposes of deciding petitioner's claim under the Confrontation Clause that no suggestion is made that Loyd's refusal to answer was procured by the petitioner, ° ° °; on this record it appears that Loyd was acting entirely in his own interests in doing so. This case cannot be characterized as one where the prejudice and the denial of the right of cross-examination constituted a mere minor lapse. The alleged statements clearly bore on a fundamental part of the State's case against the petitioner. The circumstances are therefore such that 'inferences from a witnesses's refusal to answer added critical weight to the prosecution's case in a form not subject to cross-examination, and thus unfairly prejudiced the defendant.' *Namet v. United States*, 373 U.S. 179, 187, 10 L.Ed. 2d, 284, 83 S.Ct. 1151."

In *Fletcher v. United States* (CA DC, 1964), 332 F2d 724, the court reversed defendant's conviction on facts very similar to those in the present case. Anderson, the alleged accomplice of defendant Fletcher was called to the stand as a witness but indicated his refusal to testify. The jury was excused. Counsel was appointed for him. His previous testimony before the grand jury was read to him. Anderson indicated his reliance on the Fifth Amendment. The prosecutor took the position that Anderson could not assert the privilege against self-incrimination since he had already been prosecuted for the offense. The court ruled that the jury had a right to hear the questions put to the witness. An objection was made that the procedure created an atmosphere of definite prejudice to the defendant. Nonethless, the jury was recalled and Anderson resumed the witness stand:

"He stated his name, address and age. He was then

asked, 'Do you know the defendant in this case?' and he answered, 'I refuse to answer on the grounds that it might incriminate me.' He was then asked the following questions, to each of which he made the foregoing reply:

"Were you with the defendant on March 2, 1963?"

"Were you in his company at approximately 3:30 a.m. on March 2, 1963?"

"Did you and he in the company of another boy hail a cab at about 14th and Otis Street, Northwest?"

"Did you ask this cab driver to take you to 19th and Ingleside Terrace, Northwest?"

"Did you at that point after the taxicab driver had stopped his cab, gotton out and gotten back in, did you – did you put – did you and the defendant proceed to put your arms around his throat?"

"On March 2, 1963, did you and the defendant drive this taxicab through Rock Creek Park?"

"Did you in the company of the defendant take a ring and money and identification card from the taxicab driver on March 2, 1963?"

"He was then asked whether he had appeared before the grand jury. At that point the court stopped the questioning and the witness stepped down."

It is apparent from an analysis of the foregoing line of questioning that it forecloses even the most accomplished trial attorney from the privilege of cross-examination of a witness who refuses to answer on the basis of his Fifth Amendment rights. If one compares the foregoing line of questioning with the questions asked of Timmy Williams by the United States Attorney in the instant case, it is difficult to find any substantial difference insofar as their impact on the jury is concerned and insofar as a defendant's right of cross-examination is concerned. The Court of Appeals for the Sixth Circuit in affirming the judgment of the District Court in this

case, attached some significance to the fact that Timmy Williams was offered for cross-examination when the prosecution was finished with him, and the defense declined to examine. (App. A, p. 8) With all due respect to the Court of Appeals, defense counsel hasn't yet conceived a way that he could have effectively cross-examined Timmy Williams without more firmly implanting in the jury's mind the prejudicial nature of the direct examination, and without running the serious risk of waiving any objection he might have to that direct examination. To suggest, therefore, that the error, if there was one, was mitigated somewhat by offering Timmy Williams for cross-examination is to beg the question.

> "Whether or not error by reason of the court's comments is so prejudicial as to require a new trial is not resolved by a standard of facile application. The rule was stated in a similar context in *Fahy v. Connecticut*, 375 U.S. 85, 86-87, 84 S.Ct. 229, 11 L.Ed. 2d 171 (1963), that error is not harmless if there is a *'reasonable possibility' that the matter complained of might have contributed to the conviction.* Cf. *Harrington v. California*, 395 U.S. 250, 89, S.Ct. 1726, 23 L.Ed. 2d 284 (1969); *Chapman v. California*, 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed. 2d 705 (1967); and *Kotteakos v. United States*, 328 U.S. 750, 66 S.Ct. 1239, 90 L.Ed. 1557 (1946)." (Emphasis added.)

Any suggestion that the errors complained of here were harmless must be rejected, as was that contention in *United States v. Straughan* (CA 8th, 1972), 453 F. 2d 422, 427:

> "The government next argues that, even though the character testimony was prejudicial, the case against the defendant was so strong that the error was harmless. We cannot agree.
>
> "...
>
> "'... [T]he inquiry cannot be merely whether there

was enough to support the result, apart from the phase affected by the error. It is rather, even so, whether the error itself had substantial influence. If so, or if one is left in grave doubt, the conviction cannot stand.' *Kotteakos v. United States, supra,* 328 U.S. at 765, 66 S.Ct. at 1248.

"Thus, while there may be sufficient evidence to support a conviction had the error not occurred and while a new trial might lead to the same result, we must reverse because we cannot say that the jury was not substantially swayed by the serious error committed here. *United States v. Crawford,* 438 F.2d 441, 446 (8th Cir. 1971); *Echert v. United States,* 188 F.2d 336, 342 (8th Cir. 1951). '... [T]he crucial thing is the impact of the thing done wrong on the minds of other men, not on one's own.' *Kotteakos v. United States, supra,* 328 U.S. 25 764, S.Ct. at 1247."

This court's conclusion must be the same as that recently reached in *United States v. Stanley* (CA 4th, 1972), 455 F.2d 644, 647:

> "On the facts of this case we cannot say that the error did not have 'substantial influence' upon the jury verdict, *Krulewitch v. United States,* 336 U.S. 440, 69 S.Ct. 716, 93 L.Ed. 790 (1949), and that, therefore, it is to be disregarded as harmless. Fed R. Crim. P. 52(a). To the contrary, it is clear that there is a more than 'reasonable possibility that the [error] complained of might have contributed to the conviction.' *Fahy v. Connecticut,* 375 U.S. 85, 86-87 S.Ct. 229, 230, 11 L.Ed. 2d 171 (1963)."

Considered apart from the opening statement of the prosecutor and the inferences to be drawn from Timmy Williams' refusal to testify and to answer the leading questions of the United States Attorney, the instant case was close. Mary E. Burnham, the teller at the bank, saw the bank robber face to

face, not more than two feet away, had a long opportunity to observe him, and yet could not identify the defendant as the bank robber. (App. B., pp. 97, 98) This was in spite of the fact that she viewed the defendant in two line-ups on the day following the bank robbery, the first through a window in a regular line-up and the second in a large room face to face. Larry Gerstenhaber saw the bank robber in a car parked immediately next to his before the robbery, yet he testified that he had never seen the defendant before. (App. B., p. 96) Terry Bouck observed the two robbers leaving after the robbery in their car, yet he testified that he had never seen the defendant before. (App. B., p. 96) Pat Lutomski observed both of the bank robbers before the robbery when he did some work on their car radiator. He testified that he never saw the defendant before. (App. B., p. 97) Dianne Reeves observed both robbers before the bank robbery, yet she testified that she could not identify the defendant as the person she saw in the car. (App. B., p. 97)

There was a certain amount of circumstantial evidence which linked the defendant with the crime. A button and parts of an earring were found at the scene of the robbery. "Matching" buttons and earring were found in the defendant's apartment. One of the Petitioner's head hairs was found on the coat identified as the coat worn by the bank robber. Fibers from the coat were found on the clothing of the victim, Mr. Irish. Fibers from a black afro wig recovered from Timmy Williams' locker were found in a box in Petitioner's apartment. None of the above circumstantial evidence links were positive. Rather, the fact that they were similar in many respects indicated only that they could have come from a common source. In view of the fact that the car used in the bank robbery was owned by Petitioner's wife, and not by him, the facts are entirely consistent with the theory that his wife and somone other than Petitioner committed the bank robbery.

The critical issue, therefore, was the identity of the bank robber. The opportunity for observance by several witnesses and their inability to identify the defendant point away from the guilt of Julius West. The only positive proof of the identity of Petitioner as the bank robber, aside from the circumstantial evidence which proved only that the defendant *might have been* the bank robber, was the testimony of Pauline Rogers who testified to certain alleged admissions made by the defendant after the robbery. Pauline Rogers, however, was an interested and dubious witness. She was a heroin user, (App. B., pp. 94, 95) if not an addict. She was the common-law wife of Charles West who owned the gun used in the robbery and in the murder of Stanley Irish. (App. B., p. 94) She had admittedly taken and spent some $700.00 of the bank robbery money. (App. B., p. 95) At the time of the trial the FBI obviously believed that she knew where the rest of the money was, as they continually came around and asked her about the money. (App. B., p. 95) She had made attempts to hide both the murder weapon and the coat worn by the bank robber, thus being very open to prosecution as an accessory after the fact. She therefore had several motives to put the finger on Petitioner: To protect the involvement of her common-law husband, Charles West; to fulfill a deal with the prosecution to limit her own exposure to prosecution; because she disliked Petitioner and his wife. (App. B., p. 95) Any one of these was enough to create doubt as to whether or not defendant had in fact made the admissions to which she testified. The effect of Timmy Williams' testimony, however, was to eliminate this doubt from the jurors' minds. The jury could comfortably base their verdict on the testimony of Pauline Rogers because they knew that the prosecutor had expected Timmy Williams to testify to certain very critical facts, including the crucial factor of identification of his stepfather as the bank robber. Thereafter, deciding whether or not the other evidence established the defendant's guilt beyond

a reasonable doubt was a mere academic exercise. In view of the doubtful probative value of much of that other evidence, there is certainly a reasonable possibility that the errors complained of here contributed substantially to Petitioner's conviction.

Notwithstanding the Court of Appeals' characterization of the evidence in the case as "overwhelming proof of guilt" (App. A, p. 9), with which characterization Petitioner most emphatically disagrees, the fact is that without the inferences flowing from the prosecutor's opening statement, the calling of Timmy Williams as a witness on two occasions, on one of which he broke down weeping under examination by the prosecutor, and the Court's instruction to the jury, the case was a very close case on the evidence. The sensational nature of the errors complained of here mandate review by this Court of all of the circumstances leading to Petitioner's conviction.

## CONSTITUTIONALITY OF SEARCHES

### I

On January 11, 1972, approximately eight agents of the Federal Bureau of Investigation and of local police forces entered the apartment of the defendant, displaying at least one shotgun. The defendant was advised of his constitutional rights, and then signed a consent to search form. Shortly thereafter, the defendant terminated the subsequent search before the agents had completed it, and has since that time, both in a pretrial Motion to Suppress and at the trial, denied that his consent was voluntary.

If the Fourth Amendment is to afford any protection to the defendant and to any person confronted by armed officers of the law in his own home, then this Court must seriously weigh

the circumstances surrounding the defendant's alleged consent. The Court of Appeals for the Ninth Circuit in *United States v. Page*, 302 F2d 81, 84 (1962), said:

> "The government must prove that consent was given. It must show that there was no duress or coercion, express or implied. The consent must be 'unequivocal and specific' and 'freely and intelligently given.' There must be convincing evidence that defendant has waived his rights. There must be clear and positive testimony. ' "Courts indulge every reasonable presumption against waiver' of fundamental constitutional rights." ' Coercion is implicit in situations where consent is obtained under color of the badge, and the government must show that there was no coercion in fact."

This Court stated in *Bumper v. North Carolina*, 391 U.S. 548, 550, 20 L.Ed. 2d 802, 88 S.Ct. 1788 (1968):

> "When a prosecutor seeks to rely upon consent to justify the lawfulness of a search, he has the burden of proving that the consent was, in fact, freely and voluntarily given."

Since consent to search is not to be lightly inferred, lest the protections of the Fourth Amendment be little more than hollow platitudes, the Government has a heavy burden of proof. The Government must establish consent "by 'clear and convincing evidence' " *United States v. Lewis*, 274 F.Supp. 184, 187, (S.D.N.Y., 1967), and that the "consent was 'uncontaminated by any duress or coercion, actual or implied.' " *People v. McKelvy*, 23 Cal. App. 3d, 1027, 100 Cal. Rptr. 661, 664 (1964).

Petitioner recognizes that the standard for review of a United States District Court's denial of a Motion to Suppress is the "clearly erroneous" rule. *Page, supra; People v. Ramos*, 25 Cal. App. 3d 529, 101 Cal. Rptr. 230 (1972). Here, the

Court was clearly erroneous in his failure even to consider certain elements and in his interpretations of certain other elements.

The hearing on the Motion to Suppress provides a detailed account of the events surrounding the alleged consent. By their own admission at the hearing, the FBI agents realized that they lacked probable cause to obtain a search warrant for the Petitioner's apartment. (App. B., p. 86) Therefore, they went in force to his apartment ostensibly for the purpose of interviewing him, and with the hope that they might at the same time obtain his consent to search. (App. B., p. 86) When Petitioner opened his door, he was confronted by FBI Agent Jackson and another agent who was crouched and pointing a shotgun at him. (App. B., p. 86) Special Agent Yessick, who was in charge of the case, testified to the presence of the shotgun and stated that he hoped that it was held in a "ready position." (App. B., p. 88) Petitioner, who was "obviously in pain," backed into his living room, and was directed to the kitchen. (App. B., p. 86) When one of the agents asked if they could search the apartment, indicating that they could obtain a search warrant in any event, Petitioner reluctantly acquiesced (App. B., p. 87), stating that with a shotgun pointed at him, he wasn't going to argue with the FBI. (App. B., p. 87) Although he signed the consent form, none of the agents could positively testify that they saw or heard him read the form. After several minutes, and then while at least half a dozen agents were searching his apartment thoroughly, Petitioner terminated the interview and search. The agents left soon thereafter, taking with them a button and a spool of thread which they had found in the apartment. These two items were later offered in evidence against Petitioner.

It is necessary to analyze each factor in the above-described events separately, but doing so also distorts the actual events, inasmuch as their totality determined the impact and effect

upon Petitioner's voluntariness. It should be noted, therefore, that although various factors can and must be considered, the combination of events and their sequence is more significant than any one isolated incident or communication. As the District Court for the Southern District of New York stated in the *Lewis* case, *supra*, at 189:

> "The presence of some or all of the aforementioned factors is not controlling, since (as the Government concedes) each case 'must stand or fall on its own special facts,' *United States v. Dornblut*, 261 F2d 949, 950-951 (2d cir.), cert. denied 360 U.S. 912, 79 S.Ct. 1298, 3 L.Ed. 2nd 1262 (1959). These factors, however, are probative indicia on the issue of whether a purported consent is valid and effective."

The factors mentioned by the *Lewis* court were (1) the presence of some physical intimidation, such as handcuffs, weapons, etc.; (2) whether the suspect was under arrest or in custody; (3) the evasive conduct of the suspect, leading to the suspicion aroused by a claim that he was both evasive and cooperative simultaneously; and (4) a denial of guilt or a denial of the presence of any incriminatory objects. Other cases indicate that various factors may be significant: the assertion of the availability of a search warrant, *Bumper, supra*, and *Weed v. United States*, 340 F.2d 827, (CA 10th, 1965); the lack of probable cause to obtain a search warrant, with the consequent tendency of police officers to too eagerly obtain a suspect's consent, *Catalanotte v. United States*, 208 F.2d 264 (CA 6th, 1953); the physical condition of the suspect, *United States v. Elrod*, 318 F.Supp. 524, (E.D.La., 1970), (though not necessary to the decision there, the court noted that it had considered the consenting party's mental capacity).

When Petitioner opened his door to the agents on the morning of January 11, he was confronted by approximately

eight armed officers, one of whom was openly displaying a shotgun and quite possibly pointing it directly at him. Although the trial judge at the hearing on Petitioner's Motion to Suppress stated that he heard no evidence as to the effect of this weapon on the mind of Petitioner (App. B., p. 89), Petitioner himself testified at the hearing that he was intimidated and that he backed across his living room because the gun was pointed at him. He further testified that he consented to the search because, among other reasons, he was taking no chances with the shotgun pointed at him.

In the *McKelvy* case, *supra*, police officers stopped a young man for violation of a curfew imposed following a race riot. As one officer approached the young man with a shotgun, three others "covered" him with either shotguns or carbines. In that case, the California Appellate Court found that:

> "In these circumstances, no matter how politely the officer may have phrased his request for the object, it is apparent that defendant's compliance was, in fact, under compulsion of a direct command by the officer." 100 Cal. Rptr. at 664.

In the instant case, Petitioner testified that he felt compelled to cooperate, at least partly because of the shotgun. The presence of he shotgun was corroborated by the agents themselves, and Agent Yessick testified that he would hope that it was being held in a ready position, i.e., one from which it could be effective. Failure of the trial judge to even consider this testimony renders his denial of the Motion to Suppress clearly erroneous.

This Court recognized in 1953 in *Catalanotte, supra:*

> "It is a reasonable assumption that almost any person, when a group of police officers had barged into his home in the dead of night indicating strongly that he was under investigation for crime, would be frightened into inviting

the officers to go ahead and search his premises. We have noted with disapproval the growing tendency on the part of police officers to be very quick on the trigger in construing – and acting upon their construction – a statement of some known offender as an invitation to search his premises. The present case is a rather extreme example of this tendency; and the action of the officers involved herein is disapproved." 208 F.2d 268.

There are differences between the *Catalanotte* case and the instant case – the intrusion in the instant case occurred in the daylight hours and not at night, but in *Catalanotte* the defendant was not in physical discomfort, there was no assertion of the alternative of the search warrant, and although the officers were armed, there is no indication that they displayed their weapons. The instant case, it is submitted, is an even more extreme example than *Catalanotte* of the tendency of the police to construe ambiguous conduct as an invitation to search one's premises.

Petitioner further testified that he was told that if he did not consent to this search the agents would obtain a search warrant anyway, and the District Court obviously credited that testimony as true. (App. B., p. 87) The Tenth Circuit recognized in the *Weed* case, *supra*, that such a statement is implicitly coercive. In that case, Kansas police, exhibiting drawn pistols and a riot gun, stopped a car, ordered the occupants out and arrested them. Asking to search their car, the arresting officers had no warrant but told the driver that they could obtain one. The court noted that "that such an alternative allows freedom of choice is at least suspect," 340 F.2d at 829.

In addition to the explicitly coercive factors of the displayed shotgun and the assertion of the availability of the search warrant, and considering the state of mind of the agents and their desire to search the apartment without a warrant, other factors contributed to the absence of voluntari-

ness in the defendant's consent: his physical discomfort, to which even the agents testified at the hearing; the denial of guilt by the defendant and his denial of any connection with the crime; his abrupt termination of the "interview" and the search as soon as he fully realized the significance of what was happening; the fact that he didn't sign any papers until the officers were preparing to leave; (App. B., p. 87), and, finally, the failure of any agent to testify that anyone heard the defendant read the consent to search form aloud. Taken in totality, these factors require a finding by this Court that the District Judge was erroneous in his finding that the consent of the defendant was given voluntarily.

The Court of Appeals in considering the validity of the two searches that occurred, the first by consent and the second by warrant, again begged the question. The Court of Appeals did not decide whether the two searches were valid because it determined "that the evidence obtained from them, considered in the light of the other overwhelming proof of guilt, did not affect the verdict." (App A, p. 9)

The evidence obtained in the "consent search" was a button and a spool of thread. The Government's case rested heavily upon circumstantial evidence – a green and black tweed coat, the button, the spool of thread, an earring clip, hair fibers, and a gun. Two of the most crucial pieces of evidence that were introduced during the trial were the button obtained in Petitioner's apartment, which allegedly matched in all respects a button found at the scene of the crime, and a spool of thread found in Petitioner's apartment, the thread matching in some respects the thread which was used to manufacture a home-made earring found at the scene of the crime. It is inconceivable that the button and thread taken from Petitioner's apartment did not have substantial influence on the outcome of the trial. *United States v. Straughan* (CA 8, 1972) 453 F.2d 422; *United States v. Stanley* (CA 4, 1972)

455 F.2d 644. As long as the evidence wrongfully admitted could have contributed to the outcome of the trial, the verdict must be reversed.

## II

On January 13, 1972, United States Commissioner Stephen W. Karr issued a search warrant for Petitioner's apartment, upon Affidavit filed by Special Agent Yessick (App. C., pp. 99-101). In order for the Government to sustain the admission into evidence of any items seized pursuant to that search warrant, it must be shown that that warrant was based upon probable cause. Petitioner submits that it was not.

The Fourth Amendment to the United States Constitution requires that any officer issuing a search warrant must have some probable reason to believe that the items sought by the police officers seeking the warrant will be found in the premises to be searched. As this Court stated in *Berger v. New York*, 388 U.S. 41, 55, 18 L.Ed. 2d. 1040, 89 S.Ct. 1873 (1967):

> "Under it (the Fourth Amendment) warrants may issue 'but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.' Probable cause under the Fourth Amendment exists where the facts and circumstances within the affiant's knowledge, and of which he has reasonably trustworthy information, are sufficient unto themselves to warrant a man of reasonable caution to believe that an offense has been or is being committed."

This Court recognized in *Aguilar v. Texas*, 378 U.S. 108, 111, 2L.Ed. 2d 723, 84 S.Ct. 1509, (1964):

> "Although the reviewing court will pay substantial deference to judicial determinations or probable cause, the court must still insist that the magistrate perform his

'neutral and detached' function and not serve merely as a rubber stamp for the police."

Here, the United States Commissioner could not have found probable cause in the Affidavit upon which the warrant was based. The crucial elements of the Affidavit concern the statements on oath by the affiant, Billy E. Yessick, Special Agent of the Federal Bureau of Investigation, that he sought the search warrant on the basis of information received from two confidential informants.

The standard to be applied in evaluating probable cause based upon information received from informants has been stated in *Aguilar, supra,* at 114-115:

> "Although an affidavit may be based on hearsay information and need not reflect the direct personal observations of the affiant, *Jones v. United States,* 362 U.S. 257, 4 L.Ed. 2d 697, 80 S.Ct. 725, 78 ALR2d 233, the magistrate must be informed of some of the underlying circumstances from which the informant concluded that the narcotics were where he claimed they were, and some of the underlying circumstances from which the officer concluded that the informant . . . was "credible" or his information "reliable." Otherwise, "the inferences from the facts which lead to the complaint" will be drawn not "by a neutral and detached magistrate," as the Constitution requires, but instead, by a police officer "engaged in the often competitive enterprise of ferreting out crime," *Giordenello v. United States, supra,* 357 U.S. at 486, 2 L.Ed. at 440, or, as in this case, by an unidentified informant."

There are, therefore, two separate elements which must be established in order to show probable cause for a search warrant. First, it must be shown that the allegedly reliable and confidential informant based his report to the affiant on some facts or circumstances within his own personal knowledge.

The first confidential informant, who was identified at the hearing on Petitioner's Motion to Suppress as his step-son, Timmy Williams, allegedly did observe the facts which he relayed to the FBI. However, the second confidential informant, whose identity the Government refused to reveal, may well have been relaying information of which he did not have any personal knowledge. When his contact, Detective Sergeant Fox of the Lansing Police Department, was asked whether his informant had actually seen the bank loot placed in the record player in Petitioner's apartment, Fox replied: "He didn't specifically answer that when I asked him. I said to him, 'How do you know for a fact the money is there,' and he said, 'Fox, believe me, it is there.' He says, 'It is there right now." (App. B., p. 93). For all Fox knew, therefore, his informant could very well have been, and probably was, passing on hearsay information, the reliability of which was never tested, information which on defendant's Motion to Suppress there was no way to challenge. It was that information, passed on from Fox to Yessick, which Yessick relayed to U.S. Commissioner Karr by way of Affidavit, and objected to by defense counsel as "hearsay piled upon hearsay" in the hearing on the motion. (App. B., p. 93) The fear that the Courts express rightfully when confidential informants are used as the bases of affidavits for search warrants is that the informant could be merely passing on hearsay, and that the informant's conclusions should be accorded no greater weight than any affiant's unsupported conclusions. As this Court stated in *Spinelli v. United States*, 393 U.S. 410, 416-417, 21 L.Ed. 2d 637, 89 S.Ct. 584, (1969):

> "In the absence of a statement detailing the manner in which the information was gathered, it is especially important that the tip describe the accused's criminal activity in sufficient detail that the magistrate may know that he is relying on somehing more substantial than a casual rumor circulating in the underworld or an accusation

> based merely on an individual's general reputation. . . . Here, the only facts supplied were that Spinelli was using two specified telephones and that these phones were being used in gambling operations. This meager report could easily have been obtained from an offhand remark heard at a neighborhood bar."

Justice White, concurring in the *Spinelli* decision, pointed out the reason for demanding that the circumstances upon which the informant bases his conclusion be clearly identified:

> "Nor would the missing elements be completely supplied by the officer's oath that the informant has often furnished reliable information in the past. This attests to the honesty of the informant, but Aguilar v. Texas, supra, requires something more – did the information come from observation, or did the informant in turn receive it from another? Absent additional facts for believing the informant's report, his assertion stands no better than the oath of the officer to the same effect." *Spinelli, supra,* 393 U.S. at 424."

In the instant case, the unidentified and confidential informant, as far as Commissioner Karr could have known, was merely relaying underworld rumor or an "offhand remark heard at a neighborhood bar." Thus, the first element of the *Aguilar* test for determining the sufficiency of probable cause was clearly missing as to the second informant. Since that informant's information was crucial to the issuance of the warrant, and that information did not pass the *Aguilar* test, it does not hold up as laying the foundation for "probable cause."

The second element of the *Aguilar* test, that the informant be shown to have been reliable in the past, also fails in the present case. As to Timmy Williams, the statement by affiant Yessick in the Affidavit that Williams was a confidential informant who had been reliable in the past and whose information had been independently verified by subsequent investi-

gation, was obviously false. Yessick admitted at the hearing on the Motion to Suppress that Timmy Williams was not "a confidential informant who had been reliable in the past." (App. B., p. 93) The District Judge recognized that Timmy Williams had not been a reliable informant for the FBI, and that "the information" obtained from him "was uncertain in that respect", to the extent that Yessick felt obliged to reveal that "informant's" identity as Timmy Williams. If Williams' information was unreliable, as the court itself suggested, then it follows that it cannot have supported the issuance of a search warrant. The District Judge himself stated that the determination of probable cause must be made on the basis of the Affidavit alone, and not on information which is extrinsic to the Affidavit. (App. B., p. 90)

At the hearing on his Motion to Suppress, Petitioner West objected also to Yessick's testimony of factual details which were not alleged in his Affidavit and of which Commissioner Karr could have had no knowledge. (App. B., p. 90). That objection was overruled. (App. B., p. 90). Yessick went on to testify at considerable length to matters which were clearly beyond the scope of the Affidavit, and which therefore could not have formed the basis for the Commissioner's determination of "probable cause." (App. B., pp. 90-92). The only facts before the Commissioner were those set forth in Yessick's Affidavit, and of those facts, those relating to the information furnished by informant Timmy Williams and the unidentified informant have been shown not to have satisfied the requirements of *Aguilar, supra*. As to the other facts before the Commissioner, those relating to the button which was found at Petitioner's apartment during the search on January 11, 1972, must of necessity be discounted if this Court determines that Petitioner's consent to that search was involuntary, since to permit the use of evidence obtained in an unconstitutional search to support a request for a search warrant for the conduct of a constitutional search would be unconscionable

and a repudiation of "the fruit of the poisoned tree" doctrine.

A further allegation of fact made in Yessick's Affidavit was that on January 10, 1972, Petitioner robbed the First National Bank of East Lansing and shot and killed the manager thereof. The District Court found that allegation to be purely conclusory and of no merit for purposes of finding probable cause to issue a search warrant. (App. B., p. 89)

Leaving therefore, as the *only allegations of fact properly before Commissioner Karr:* "... that Earline Peggy Ann West did admit to being at the First National Bank of East Lansing ... at approximately 1:50 p.m., and she also stated she was alone and driving a 1964 Ford, bearing 1971 Michigan plates NDF531," and that "... information (was) furnished by several witnesses who state two persons were in the above vehicle at the above bank at approximately 1:50 p.m. on January 10, 1972." Clearly, the aforesaid standing alone would not support a search of Petitioner's apartment for those things alleged by Yessick to be the object of the search: "a green and black tweed woman's coat with fur collar, a black purse, a pair of black flare pants, a part of an earring, sunglasses, hair fibers, blood specimens, a revolver, and any fruits of the robbery...." Only by including in his Affidavit factual allegations which, first of all, he had no personal knowledge of, and, secondly, were improper under "the fruit of the poisoned tree" doctrine or under the *Aguilar* tests, deficiencies which the Commissioner would have no way of recognizing in view of his limited exposure to the case, was Yessick able to obtain a warrant for the search of defendant's apartment.

The items recovered during that search, to wit, the hair fibers and the rhinestone clip, should not have been admitted into evidence. Like the items recovered under defendant's consent to search, the button and the spool of thread, they should have been excluded. The admission of all such evidence, over defendant's objection, was a violation of defendant's Fourth Amendment rights.

Again, the Court of Appeals declined to decide whether the search conducted under the search warrant was valid for the reason previously stated herein, namely "that the evidence obtained from [both searches], considered in the light of the other overwhelming proof of guilt, did not affect the verdict." (App. A, p. 9) The items recovered under the search warrant were hair fibers removed from a box in the hall of Petitioner's apartment which matched fibers of a wig found in Timmy Williams' locker, and a rhinestone clip which was identical in shape and size to a rhinestone clip which was a part of the earring which was found at the scene of the crime. Between the two searches, therefore, the FBI was able to generate hair fibers which matched hair fibers on the wig, a rhinestone clip which matched a rhinestone clip found at the scene of the crime, a button which matched a button found at the scene of the crime as well as the buttons found on the green and black tweed coat, and a spool of thread which matched the thread used in the home-made earring found at the scene of the crime. It is inconceivable that the web of circumstantial evidence spun by all of those items, wrongfully seized in derogation of the Petitioner's constitutional rights, did not overwhelm the jury in its significance in evaluating Petitioner's guilt or innocence. All of those pieces of evidence, relied on so strongly by the Government, linked the Petitioner's apartment at 812 West Lenawee to the crime, and, necessarily, the people who dwelled therein, one of whom was Petitioner. Of approximately seven pieces of circumstantial evidence offered during the trial – the green and black tweed coat, the gun, an afro wig and its fibers, the earrings and their clips, the buttons, and the spool of thread – four were seized during the two searches. Absent those four pieces of evidence and absent the highly prejudicial nature of the prosecutor's opening statement and his decision to recall Timmy Williams to the witness stand a second time, knowing that he would decline to testify, there was no "other over-

whelming proof of guilt" on which the Court of Appeals could rely in declining to rule on the validity of the two searches.

## CONCLUSION

For the foregoing reasons, this Peition for a Writ of Certiorari should be granted.

Respectfully submitted,

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APPENDIX A

No. 72-1846

# UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

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| UNITED STATES OF AMERICA, *Plaintiff-Appellee,* v. JULIUS WEST, *Defendant-Appellant.* | ON APPEAL from the United States District Court for the Western District of Michigan, Southern Division. |

Decided and Filed October 31, 1973.

Before: PHILLIPS, Chief Judge, and McCREE, Circuit Judge and WILSON*, District Judge.

McCREE, Circuit Judge. In this appeal from conviction of bank robbery,[1] use of a firearm to commit a felony against the United States,[2] and killing of a bank employee in the course of the robbery,[3] we are asked to determine whether the prosecution's opening statement and its calling of a reluctant witness constitutes reversible error and whether two searches, one with and one without a warrant, were lawful. We affirm the judgment.

On January 10, 1972, at approximately 1:30 p.m., a branch of the First National Bank of East Lansing, Michigan; an institution insured by the Federal Deposit Insurance Corporation,

* The Honorable Frank W. Wilson, Chief Judge, U. S. District Court for the Eastern District of Tennessee, sitting by designation.

1 18 U.S.C. § 2113(a).

2 18 U.S.C. § 924(c) (1).

3 18 U.S.C. 2113(e).

was robbed of approximately $15,000 by a male posing as a female. The branch manager, a retired 62 year old former school teacher, struggled with the bandit in an attempt to prevent the robbery and was fatally shot.

Appellant was arrested on January 12 and the grand jury returned a three-count indictment. Appellant moved to suppress evidence taken from his apartment pursuant to an alleged consent search on January 11 and another conducted the following day under the authority of a search warrant. The motion was denied and a jury trial ensued in which West was convicted on all counts. He received a twenty year sentence for the bank robbery, a ten year sentence for possession of a weapon in the perpetration of the robbery, and a life sentence for homicide. The sentences are to run concurrently. The proceeds of the robbery had not been recovered at the time of trial.

The government's evidence, not affected by appellant's charge of incompetency, follows.

In July or August 1971, appellant, in a conversation with his brother-in-law, said that the bank on Lake Lansing Road would be easy to rob because it was located in a secluded place. They discussed the feasibility of a robber disguising himself as a woman.

Julius West customarily wore a moustache and goatee, but on January 9, 1972, he was observed to be clean-shaven. On January 10, 1972, shortly before 2 p.m., an automobile, later found to be registered in the name of appellant's wife, was driven into a service station on Lake Lansing Road in the vicinity of the bank. The automobile was unmistakably distinctive: a 1963 or 1964 green or dark blue Ford automobile with the headlights smashed in and the hood tied down by a piece of colored plastic string that was described as looking like a child's jump rope. The driver was identified as a lady and she and the other occupant wore "large Afros". They asked to

have their water checked because the radiator was steaming. The attendant testified that the vehicle departed in the direction of the bank.

Other witnesses observed the same vehicle with two passengers on Lake Lansing Road at about this time. They described the occupants as colored, with "Afro hairdos", and their attention was attracted by the damaged front end and the tied down hood. One of these witnesses saw the car parked in the bank parking lot shortly before 2 p.m. that day. He noticed that steam was escaping from its radiator and that a woman was attempting to tie the hood down with a multicolored string. She spurned his offer of assistance. He observed that there was a passenger whom he thought to be a woman. Two of these witnesses later identified the same vehicle in the parking lot at appellant's apartment.

The bank teller, the only other person besides the branch manager who was in the bank before the bandit entered, testified that a man disguised as a woman and wearing a black and green tweed coat, a large "Afro" wig, earrings and black slacks, approximately five feet eight inches tall, cleanshaven with clear complexion and large lips, entered the bank at approximately 1:30 p.m. She described his actions and narrated the efforts of the manager to overpower the robber and how the manager was shot several times with a silver or aluminum colored handgun. Although she could not identify appellant at a showup or at the trial, she identified a coat that belonged to appellant's wife as similar to the one worn by the robber.

Appellant's brother's common-law wife, Pauline Rogers, lived in the same building in which appellant's apartment was situated. She testified that on the evening of January 10, she saw appellant holding a large number of $50 bills and other denominations and that he dropped some of the money. She recovered about $62 of the money he dropped and hid it on

her person. She said that appellant boasted to his brother that he and his wife had robbed a bank in East Lansing that day and that he had shot a man five times. He said that he was dressed as a woman with a natural wig, earrings, coat, big pocketbook and a slack suit. She identified a chrome or nickel-plated Smith & Wesson revolver as her husband's gun and said that appellant had access to it. She said that on the evening of the robbery her husband gave her the gun and that she hid it first in her niece's backyard and later gave it to her brother to hide for her. Her brother, Andrew Perkins, buried the gun near Charlotte, Michigan, a neighboring community. Perkins later took law enforcement officers to the place where he had buried the gun and it was recovered. Ballistics tests established that the bullet removed from the body of the slain branch manager had been fired from the revolver recovered at Charlotte, Michigan.

Pauline Rogers also testified that appellant's wife, her sister-in-law, gave her a coat earlier identified by the bank teller as one similar to that worn by the robber. Pauline Rogers first gave the coat to a girlfriend who returned it when she learned about its recent use. Then, she gave a man $10 to burn the coat or otherwise dispose of it but his attempt to burn it failed and he returned it. She later surrendered the coat to an FBI agent.

A fellow inmate testified that West, while he was in custody awaiting trial, told him, "they could not prove it was me because nobody could identify me."

Undisputed laboratory tests revealed that a hair fiber found on the woman's coat was similar to hair obtained from Julius West, and that two hairs found on the coat were similar to hair obtained from the head of the deceased branch manager. Also, fibers from the coat matched fibers found in the branch manager's tie clasp, and fibers from the victim's clothing matched fibers from the coat recovered from Pauline Rogers.

Appellant took the stand in his own behalf and testified that

he had been suffering from an arthritic spinal condition on January 10 and that he had remained home alone and in bed all that day. He denied any involvement in the bank robbery and said that his wife's black and green tweed coat had been stored in the basement of his apartment building and that he believed she had not been wearing it. He admitted that he wore a moustache and goatee before January 10, 1972, but explained that he shaved them off because he had accidently cut off one side of his moustache and that he removed the other half and his goatee when he became the object of ridicule with only a goatee. He admitted that the automobile that had been observed at the bank was registered in his wife's name but stated that it belonged to his son-in-law who was too young to register it in his own name.

Appellant's first contention of error is that he was denied a fair trial when the United States attorney outlined in detail in his opening statement the expected testimony of Timothy Williams, appellant's stepson, who thereafter did not testify as predicted. He contends that the United States attorney's conduct in calling Timothy Williams to the stand, even after he had been granted immunity, constituted the denial of a fair trial.

In his opening statement, the United States attorney outlined the evidence he expected from all the witnesses and included a summary of the evidence he expected from Timothy Williams. He told the jury that he expected that Timothy would testify that he did not attend his high school classes on January 10 and that he was home after two o'clock when his stepfather and mother returned; that his stepfather was dressed as a woman; that his stepfather inquired from his mother whether they had obtained any "ones"; and that his stepfather asked him to unfasten a brassiere which he was wearing.

Timothy Williams had given a statement substantially to

this effect to investigating FBI agents, and, at the trial, the United States attorney called Timothy Williams as a witness. Defense counsel requested that the jury be excused and then suggested to the court that Williams might incriminate himself if he should testify consistently with the statement which defense counsel had been permitted to examine. The court examined the witness out of the presence of the jury and decided to appoint an attorney to represent him because of the possibility of self-incrimination and because he was only 16 years old. Accordingly, he was temporarily excused from testifying.

While the trial proceeded with other witnesses, the government obtained an immunity order for Timothy Williams pursuant to 18 U.S.C. § 2514. Thereupon, the court and the lawyer appointed to represent him explained to him that he could no longer assert the privilege against self-incrimination. Williams then was recalled to the stand and, after testifying that he lived with his stepfather and mother, said that he preferred not to answer the questions whether his parents left the apartment on January 10. Although the court instructed him to answer, he refused. He testified that he had seen his mother wear the coat that had been received in evidence, denied that he had seen the gun, and said he preferred not to answer the question whether his stepfather had a moustache and goatee prior to January 10. He also declined to answer this question when the court instructed him to do so. He admitted that he took part of a wig in his tennis shoes to his locker at school but denied he knew who put the parts of the wig in his shoes. He did not recall whether his stepfather came home wearing a green coat and a brassiere, or whether he was asked to help unfasten the brassiere. The court took no action against Timothy Williams for declining to answer as

instructed.[4] Defense counsel timely moved for a mistrial.

At the outset, we observe that this is not a case where an inflammatory opening statement was made to poison the minds of the jury against a defendant or to destroy his credibility before any evidence should be presented. *Cf. United States* v. *Burton Signer*, ——F.2d ——(No. 72-1978, 6th Cir., July 25, 1973). Nor is it a case where the prosecution made an opening statement in bad faith without any reasonable expectation of presenting the promised evidence. *See San Fratello* v. *United States* 340 F.2d 560 (5th Cir. 1965). And it is not a case where a prosecutor, in his questioning of a witness who claimed his privilege against self-incrimination, employed improper examination techniques such as reading the entire transcript of an FBI interview to see whether the witness would contradict it, *United States* v. *Compton*, 365 F.2d 1 (6th Cir. 1966); or persistently asking the same questions that had been repeatedly answered in the negative, *Jones* v. *United States*, 338 F.2d 553 (D.C. Cir. 1964); or prefacing questions with the inquiry "did you tell me" in such a manner as to place in issue the prosecutor's credibility, *United States* v. *Puco*, 436 F.2d 761 (6th Cir. 1971). Here appellant does not accuse the prosecution of any misconduct and we find none.

Appellant contends, nonetheless, that error was committed because the opening statement placed before the jury the testimony of Timothy Williams, testimony that appellant could not test by cross-examination because the witness refused to be examined on the critical matters related. Accordingly, he claims his constitutional right to be confronted by the witnesses against him was abridged. *See Douglas* v. *Alabama*, 380 U.S. 415 (1965).

[4] 18 U.S.C. § 2514 provides that upon entry of an immunity order a witness shall not be excused from testifying on the ground that the evidence required of him may tend to incriminate him. It also provides tha tthe witness shall not be exempt from prosecution for perjury or contempt committed while giving testimony under compulsion.

However, we determine that the facts in this case bring it within the rule of *Frazier* v. *Cupp*, 314 U.S. 731 (1968), instead of that enunciated in *Douglas*, *supra*, where under guise of cross-examination, and despite the refusal of a witness to answer, the prosecution read, in the presence of the jury, the witness's confession that implicated the defendant and then proceeded to authenticate the confession, although it was never introduced in evidence, by the testimony of three law enforcement officers. In *Frazier* v. *Cupp*, it was held that no deprivation of the right of confrontation results when a prosecutor sets forth in his opening statement a summary of the testimony he expects, in good faith, from a witness who later declines to testify, when the summary is not emphasized in any particular way, takes only a few minutes to recite, and is sandwiched between a summary of other evidence the prosecution expects to introduce. In this appeal, Williams' testimony was not isolated in the opening statement but, instead, was an integrated part of a statement that fairly summarized all the evidence, circumstantial and direct, that the prosecution intended to present to prove the crimes charged in the indictment. And, as in *Frazier* v. *Cupp*, the district court advised the jury that the opening statement, as the United States attorney also declared, is not evidence and should not be so regarded.

Another factor not to be overlooked in this case is that Williams was called as a government witness and did in fact testify, although his direct testimony was limited by his professions of lack of memory and by his declining to answer significant questions. Also not to be overlooked is the fact that Williams was offered for cross-examination, a right the defense declined to exercise.

We observe, however, that this case alerts us to the potential danger presented by a too-detailed opening statement. If a failure of proof should occur, the jury in its deliberations

might consider, as if it had been given, the testimony it was told to expect from a witness even though that witness did not testify. And if a court apprehends a substantial danger of a jury's doing so, the prosecution risks a mistrial or reversal of a conviction. Here, we are satisfied that the prosecutor did not overstep the line drawn by *Frazier*, and did everything he could after the opening statement to prevent everything he could after the opening statement to prevent prejudice in this respect. He obtained an order of immunity to require the witness to testify and he could have insisted on the witness answering his questions. That he and the court did not follow this course may have been because Williams' lawyer and the prosecutor disclosed that the boy had been threatened by appellant in an effort to seal his lips. A careful review of the entire record convinces us that no error was committed with respect to the opening statement and the testimony of Timothy Williams.

Appellant's remaining two contentions of error concern the two searches of his apartment. The first search was conducted on January 11, 1972 and yielded a spool of beige thread similar to some thread found in the bank and a button that matched those on the coat received later from Pauline Rogers. The government contends that this search was lawful because appellant consented to it and evidenced his acquiescence by executing a consent-to-search form.

The second search was carried out on January 13 pursuant to a search warrant. On this occasion, the FBI agents seized a rhinestone Christmas tree-shaped ornament that matched parts of earrings found in the bank, and black fibers that matched fibers found on the black and green coat and could have come from the wig.

Appellant contends that the district court erred in finding that his consent to the first search was voluntary. He claims the evidence showed that he was intimidated by the eight

officers who pointed a shot gun at him and falsely told him they could obtain a warrant, although their request for one had just been denied by a magistrate. He contends that the second search was unlawful because the affidavit upon which the search warrant was based contained information obtained in the first search and contained hearsay evidence not from proven reliable sources.

We regard as substantial the question whether consent can be voluntary when it is procured from a suspect confronted with a firearm and deceived by the false assertion that a search warrant can be obtained. "[T]he Fourth and Fourteenth Amendments require that a consent not be coerced, by explicit or implicit means, by implied threat or covert force. For, no matter how subtly the coercion were applied, the resulting consent would be no more than a pretext for the unjustified police intrusion against which the Fourth Amendment is directed." *Schneckloth* v. *Bustamonte*, — U.S. — (1973).

Nevertheless, we find it unnecessary to decide whether these searches were valid because we determine that the evidence obtained from them, considered in the light of the other overwhelming proof of guilt, did not affect the verdict. Accordingly, any error resuling from the admission of this evidence is harmless beyond a reasonable doubt. *Brown* v. *United States*, — U.S. — (1973), *Chapman* v. *California*, 386 U.S. 18 (1967).

Affirmed.

## APPENDIX B

(Excerpts from Trial Transcript)

Trial Trans. pp. 8-413.

. . . And we will also show you that a young man by the name of Timothy Williams—he is the stepson of Mr. Julius West, who will tell you that on January 10—incidentally, that day of the week was a Monday—who will show that although he was a student in Lansing High School in Lansing, Michigan, he did not attend school that day; that he was living with his mother, who is the wife of Mr. Julius West, and that they were living at an address at 812 West Lenawee Street in the city of Lansing in Apartment 12, and that on the day in question, that is, January 10, we will show by evidence from Mr. Timothy Williams that he was home that day, that he was home that day after 2:00 o'clock in the afternoon, and he was home when his mother and stepfather returned from that horrible tragedy. *We will show by his testimony that, and he well so-testify, his stepfather came into the door, that he had part of an earring in his ear, that he had over his arm a woman's coat, salt and pepper-type coat with a fur collar. We will show you by his testimony that Mr. Julius West and his wife went into the bedroom, that shortly thereafter Mr. Julius West came out undressed and went in and took a cold shower. While he was in the shower, he yelled back to his wife, "Did we get any 1's," and that Earline, his mother, called back and said, "Yes, we got a lot of 1's."*

*You will hear the testimony from this young man that the coat in question was one that he recognized as belonging to his mother. * * * You will see that the plan in this case by Mr. Julius West and, indeed, by his wife, although we are not trying her, was that he tried to hide, so to speak, or he tried to distinguish himself not as a man, but as a woman. We will show you that he had a headpiece on, as an ex-*

*ample, which was an Afro-type headpiece, and that he wore it that day. That he even went so far as, we'll show by the witnesses, to wear a bra. And that when he returned home, Timmy Williams will tell you that one of the first things he did, upon request of his stepfather, was to release and unlock the bra which he had on.*

**TESTIMONY OF TIMOTHY WILLIAMS**

A. (Witness shakes head)

Q. But you are here to testify now, is that correct?

A. No, I am here to answer questions.

Q. Yes, that is what I am talking about.

A. Yes.

Q. And you want to, you are going to answer those questions, truthfully, is that correct?

A. Well, no, I am not, because I'm not going to answer questions. I mean, I am not going to answer your questions. Like he said, "under the Fifth Amendment," you know.

Q. Well, are you telling me that you have changed your mind and you don't want to answer questions? Is that what you are saying, Timmy?

A. *Well, I didn't say I was going to get up there on the witness stand, really. I just, you know, you asked me to come and I came.*

Mr. Eardley: I'm sorry, I can't hear his answers.

The Court: "You asked me to come and I came."

Q. Didn't you tell me as late as this morning that you are willing to testify in this case?

A. No, I didn't.

The Court: The Court will take a recess, and I will try to call counsel, appoint someone for the purpose of advising Mr. Williams.

Now, if you think the same thing is going to arise as to Mrs. Rogers—

Mr. Milanowski: Well, I wonder whether we could ask this witness to step down and call Pauline Rogers, see what she is going to testify to.

The Court: Very well. You may step down.

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The Court: Well, I did appoint Mr. Gordon Quist to represent him.

Mr. Milanowski: Yes, sir.

The Court: I would now like to ask you, have you considered Murphy versus Waterfront?

Mr. Milanowski: Yes, sir, I have read it.

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(111) error on that. I am wondering if a half-hour interval is going to be enough for me to handle this sticky problem. I can "shoot from the hip" but I am not sure of my accuracy. *These are matters, from what I understand this witness would testify to, which could be critical.*

Mr. Eardley: May I make this suggestion, your Honor, that we get Mr. Quist in here and find out what his intentions are. That may solve the whole problem. I understand that he is present with his client. Mr. Milanowski—

Mr. Milanowski: I told him I thought I had the authority and that I would shortly prepare an order for the Court's signature, and that would get the ball rolling on that score. I can't think of anything we could do, your Honor, that would be more in conformity with this Court's kindness in not trying to commit any error, that if we took that testimony outside the presence of the jury, then that Sixth Circuit case is quieted and we are not trying to do it to influence the jury.

The Court: It certainly wouldn't be prejudicial to the defendant.

Well, let's await the event of the receipt from the Department of Justice of

Mr. Hawk: Tim has a number of concerns about his testimony. He has indicated to Mr. Quist and to myself that one of the primary concerns is some threat made against him. But he has not indicated to us the source of this threat or reported its exact nature.

The Court: Well, under the circumstances, what I have basically discussed with counsel this morning before we went on the record was that it seemed to me that the first order of business was to obtain, if they are going to obtain it, the immunity and authorization to furnish immunity of prosecution to Timothy Williams. I indicated also that my connot he could be compelled to testify, was whether or not if he refused to testify, the opening statement, which included his expected testimony as narrated by the U.S. Attorney, could be deemed as prejudicial error when such testimony was not forthcoming on the trial. It seemed to me that the United States Attorney would no doubt want to make a record out of the presence of the jury showing the reasons for the inability to testify by this witness, and if there is any proof which he could place upon the record out of the hearing of the jury concerning his refusal to testify and any intimidation, that that ought to be made, because this would be an important consideration in determining, at least,

the good faith of the opening statements. Mr. Eardley has indicated that he at least reserves the right to move for dismissal at the conclusion of the proofs if they do not contain such, and the Court takes the position I would simply have to make a decision upon it.

The further question arises as to the effectiveness of the Federal Immunity Statute to grant immunity also from State prosecution. If it does, then I presume I could compel the testimony and upon its refusal it would be subject to contempt action. There apparently is a split in the Circuits as to the exact interpretation and application of the new statute, the Ninth Circuit holding that it does extend immunity and complies with the Fifth Amendment. The Fifth Circuit, on the other hand, takes a contrary view, and the issue is now before the United States Supreme Court. It has never been raised in the Sixth Circuit. That being the case, I suppose I will simply, if the prosecution goes forward, have to make a determination

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(192) The Court: Court is going to resume. The defendant is present, but the jury is not.

Mr. Milanowski?

Mr. Milanowski: May it please the Court, for purpose of the record, a witness by the name of Timothy Williams was called on behalf of the Government. The jury was then present; however, before any testimony was elicited from Mr. Williams, I think Mr. Eardley, counsel for the defendant, requested that the jury be cleared, and at that time the issue was raised that perhaps Mr. Timothy Williams would claim the privilege of the Fifth Amendment and would not testify. I think the record will show that Timothy Williams did state on the record that he would not testify.

Now, for purposes of the record, your Honor, and prior to calling Mr. Williams, my investigation shows that Special Agents Richard Hildreth and Kenneth D. Gilbart interviewed

Timothy Williams on 1-14-72 in the city of Lansing, Michigan. The statement that I would like to read into the record reads as follows. Timothy Allen Williams was contacted at 1113 Church Court, Lansing, Michigan. Timothy Williams was advised of the identity of the interviewing Agents and informed that he was being interviewed regarding the bank robbery at the First National Bank of East Lansing, North Branch, East Lansing, Michigan. Thereafter Williams promptly furnished the following signed statement: "January 14, 1972, 1113 Church Court, Lansing, Michigan. I, Timothy Allen Williams, make the following free and voluntary statement to Special Agents Richard Hildreth and Kenneth D. Gilbart who have identified themselves to me as Special Agents of the Federal Bureau of Investigation and who have advised me that they wish to talk to me concerning the bank robbery of the First National Bank of East Lansing, North Branch, on January 10, 1972.

I reside at 1113 Church Court in Lansing and my date of birth is December 19, 1955. I am currently in the tenth grade at Sexton High School in Lansing. My mother is Mrs. Earline Peggy Ann West and my stepfather is Julius Sonny West. They reside at 812 West Lenawee, Apartment 12, Lansing, Michigan. On January 10, 1972 at about 2:30 p.m. I saw my mother, Earline West, and my stepfather, Julius West, enter Apartment 12 at 812 West Lenawee, Lansing, Michigan. My stepfather, Julius, was carrying a blue suitcase and had a tweed coat over one arm. The coat was green and black, it had a black lining with a fur collar. The coat was an old one that belonged to my mother, Earline. As my stepfather entered the apartment, he was wearing black flared pants. After entering the apartment I saw Julius and Earline go directly to the bedroom. Julius, my stepfather, took the suitcase and coat into the bedroom with him. I followed my mother and stepfather into the bedroom. My stepfather took off the coat and he was wearing a bra. He asked

me to unstrap the bra, and I did. After a few minutes I left the bedroom and Julius went into the bathroom where he took a cold shower. After the shower, Julius went back into the bedroom and I went into the bathroom. While I was in the bathroom I heard Julius yell to my mother, "Did we get any 1's?" My mother said, "We got lots of 1's." Early the next morning, on January 11, 1972, at about 1:00 a.m., Chuck West, my Uncle who resides in Apartment 6 at 812 West Lenawee, Lansing, came up to my apartment, number 12, and told my stepfather, Julius, that the FBI was coming. Chuck suggested that he and Julius put the money in a brown paper bag and that Julius give the money to Chuck to hide. The money was placed in a brown paper bag and Chuck took it. Chuck left and returned about five minutes later and said to Julius that he had placed it in a trashcan in an unoccupied apartment on the second floor. Sometime during the night of January 10, 1972 Julius told my mother that he was planning to take the gun apart. I do not know what he did with the gun. I know that my stepfather owns a nickelplated revolver. Between 1:00 a.m. and 2:00 a.m. on January 11, 1972 Julius, my stepfather, became worried that Chuck might try to steal the money. He, my stepfather, contacted Chuck and Chuck brought the money back to Julius. Chuck then left and I was in bed in the living room. At this time I heard my mother talking, I heard my mother taking the record player in her bedroom apart, and I heard Julius say to my mother, "Put it flat." On January 11, 1972, at about 6:00 a.m., Julius gave me a pair of black-rimmed sunglasses and he told me to take them to school with me and get rid of them on my way to school. I put the sunglasses in a trashcan on the first floor of Sexton High School near the library. Before I went to school Julius took a black colored Afro wig that Earline, my mother, had ordered last summer from an advertisement in "Essence" magazine and he went into the bathroom and cut most of the

hair off the wig and flushed it down the toilet. He then cut the dome part of the wig into two parts, gave the parts to my mother, and she told me to put them in my sneakers, take them to school and get rid of them. Sometime during January 10th or 11th, 1972 I heard Julius tell my mother that he had thrown away a large black handbag owned by my mother into the trash bin behind our apartment. My mother, Earline, owned a set of earrings which were composed of a black woman's head surrounded by a circular piece of metal. These earrings were for pierced ears and were probably purchased at Johnny's Record Shop in Lansing. I also wanted to add that sometime during the night of January 10, 1972 I heard my stepfather, Julius, say to Chuck that he had to struggle with him. I have read the above statement consisting of this page and four others and it is true and correct."

That is signed by Timothy Allen Williams, and in the presence of Kenneth Gilbart and Richard Hildreth. Now, may the record also show, your Honor, that subsequent to that time, in the city of Lansing, that I personally, John Milanowski, the United States Attorney, interviewed the witness, Timothy Williams; that at that time I was merely taking his statement that I just read, that I talked to him about it and wanted to know whether he had any questions about his testimony which would be forthcoming in a trial against Julius West, and that at that time the witness, Timothy Williams, gave me absolutely no indication that he would not testify. The information which I have from the Special Agents of the FBI, including Mr. William Yessick, who is the Special Agent that had primary charge of the investigation of the bank robbery of January 10, 1972, indicated to me that there was no issue at all regarding the fact that Timothy Williams would not testify.

Your Honor, since that time I have, in conformity with the statute 18 U.S. Code, 2514 made application for an Im-

munity Order for the witness Timothy Williams. I at this time ask the Court to have marked as part of the file in this case the application for an Immunity Order, and a teletype message from Assistant Attorney General Henry E. Peterson, who authorized me to make this application for an order to be signed by this Court.

The Court: The Court has before it an application for Immunity Order which was presented to the Court earlier today, signed by Mr. Milanowski, United States Attorney, attached to which

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(200) which I knew this because it has been shown to me you are the stepson of Julius West who is on trial here. So I thought it was only fair that I get you counsel to protect your interests, because from what I had heard of Mr. Milanowski's opening statement, the thing you might have been called upon to testify to might have incriminated you and made you subject to being charged yourself.

So I thought you should have a lawyer, and I thought you should at least have time to think this over. We have done that. Since that time Mr. Milanowski has obtained immunity. Now, this immunity, as I understand it, is granted pursuant to the laws of the United States; it is Title 18 U.S. Code, Section 2514. My understanding as a Judge is that by signing this order, if you testify in this case, you cannot be charged with any matters arising out of this transaction. This is just that your testimony could be used, but you couldn't be charged. So, therefore, by testifying in this case you would not be incriminating yourself by giving answers to questions that were put to you.

Do you see what I mean?

Mr. Timothy Williams: Yes.

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(204) States Code reads that: "Whenever a witness in any

proceedings before or ancillary to any Court or Grand Jury of the United States refuses without just cause shown to comply with an order of the Court to testify or provide other information, including any book, paper, document, record, recording or other material, the Court, upon such refusal, or when such refusal is duly brought to its attention, may summarily order his confinement at a suitable place until such time as the witness is willing to give such testimony or provide such information. No period of such confinement shall exceed the life of: (1) The Court proceeding, or (2) The term of the Grand Jury, including extensions, before which such refusal to comply with the Court order occurred, but in no event shall such confinement exceed eighteen months.

(b) No person confined pursuant to subsection a of this section shall be admitted to bail pending the determination of an appeal taken by him from the order for his confinement if it appears that the appeal is frivolous or taken for delay. Any appeal from an order of confinement under this section shall be disposed of as soon as practicable, but not later than thirty days from the filing of such appeal."

That is what the Court deems to be the appropriate provision by law made in this case.

Now, did you have any questions you wanted to put to the Court?

Mr. Timothy Williams: No, sir.

Mr. Quist: May I ask one question of Mr. Williams? Do you have any more questions you would like to ask me?

Mr. Timothy Williams: No.

The Court: Now, if Mr. Milanowski does call you to the stand, he will be asking you questions, and if you do assert your privilege, you may consult with Mr. Quist; he is available here for your guidance, and you may consult with him. And then if the Court determines that the question is not proper, then you need not answer it. But if the Court determines it is proper and it is within the immunity granted,

then I do so-order you to answer the question.

Do you see what I am doing?

Mr. Timothy Williams: Yes, sir.

The Court: Do any other counsel have any comment or statements to make?

Mr. Milanowski: I have no further comments, your Honor.

Mr. Eardley: I assume we are going to do this out of the hearing of the jury at the moment, your Honor?

Mr. Milanowski: No, sir, I am assuming we are calling the jury back in now.

Mr. Eardley: Then I have this observation to make, your Honor, that "I am caught somewhere between the devil and the deep blue sea," having heard Mr. Williams' statement to the two FBI Agents read, anticipating what he might testify to if he elects to testify. I am frank to acknowledge I don't want the jury to hear that. On the other hand, I don't want the jury to hear him sit on the witness stand and take the Fifth Amendment question after question, then ask themselves, as indeed they must, "Why is this witness claiming the Fifth Amendment," and having been advised that he doesn't have a Fifth Amendment right by the Court, why does he continue to refuse to answer the questions and place himself in contempt of Court, unless it is for either of two reasons, either he doesn't want to testify against his stepfather, and therefore his stepfather must be guilty, or he is afraid of his stepfather. And some conclusion might be drawn from that, that his stepfather might be guilty.

So I object to the whole procedure at this point, knowing in advance that the witness has indicated he will not answer the questions and his doing so being prejudicial to the rights of the defendant.

* * * * *

The Court: "Counsel from the beginning treated this witness as a hos-

tile witness under cross-examination. His approach to questioning the witness was improper. The witness was called by the Government, and if he had knowledge pertinent to the issues, counsel should have brought it out by direct questions without reference to the statement given to the FBI. He might ultimately have been able to use the statement for impeachment purposes. If proper questions had been asked and the claim of privilege has been asserted, counsel would never have had occasion to use the statement."

Therefore I do not see this as authority for precluding the placing of the witness on the stand, having granted him immunity and putting the questions to him, and upon his, say, refusal to answer, being subject to reversal by reason of it.

Mr. Eardley: Your Honor, I cited also this morning the case of the State of Minnesota versus Mitchell. And if I may, I would like to refer to the comments of the Supreme Court of Minnesota on Mr. — or on Judge Hand's observations in United States versus Maloney, a Second Circuit case, wherein the Supreme Court of Minnesota made observations that in Maloney Judge Hand noted that when a witness claims privilege an inference arises as to what would have been his answer if he had not refused, and that if the prosecution puts the question, knowing the privilege will be asserted, it is with notice of the probable effect of his refusal upon the jurors' minds. On the other hand, he observed, he being Judge Hand, that if the State fails to call a witness, there might be an adverse inference and the jury might assume that if called the testimony of the witness would have been favorable to the accused. He concluded, and I am quoting now from Judge Hand, "We must confess that the situation is one in which either alternative results in prejudice to one side or the other and it is impossible, so far as we can see, to lay down any general rule that will cover all instances."

I think it is quite obvious that that is true, your Honor,

but it seems to me where there is any doubt of prejudice, that doubt must be revealed in favor of the criminal defendant in a criminal prosecution.

The Court: Of course, I can take note that that assumed the existence of the claim of a proper privilege, which no longer would exist here. Also, we never—

Mr. Eardley: Your Honor, the jury won't know that. They won't know whether there is a proper privilege or not. You and I know it, and so does the counsel for the Government, but—

The Court: Well, *I will not engage in any extended colloquy with you, Mr. Eardley.* I recognize the strength of your convictions in your argument. I don't think it is any different than refusal of any witness to testify under any circumstances which the Court meets daily in any trial.

Are you ready, then, to proceed?

Mr. Milanowski: We are ready to proceed, your Honor.

The Court: I believe before we do so, we'll take a short recess.

(A recess was then taken)

The Court: At the time of the recess I believe I had asked you, Mr. Milanowski, if you were ready to proceed—

Mr. Quist: If it please the Court, I wonder if I might ask a procedural question. Is the witness, Timothy Williams, presently under the blanket of immunity that the Court has granted, and will he be under that blanket when he resumes his seat on the witness stand?

Mr. Milanowski: I am sure he will, your Honor. I thought that was the understanding of the order.

The Court: I am under that impression.

Mr. Quist: Okay, then the witness will not raise his privilege against self-incrimination upon the asking of each individual question; I mean, he will just sit on the stand and we'll see what happens.

The Court: Well, am I to understand—do I understand that

you are, on his behalf, would raise the privilege or—

Mr. Quist: Yes, he would. I think that—I have already stressed to the Court that the witness, Timothy Williams, does not wish to testify in this matter, because anything he says as a witness may be used to incriminate him, and I think that he has a privilege, then, under the Fifth Amendment. The Court has entered its Immunity Order to protect him and to, well, his immunity is substituted for his Fifth Amendment privilege, and my only point is that rather than raise the privilege each time the question is asked, I would raise the question prior to the time he gets on the stand, and I just want to make sure when he is up there the immunity is on him when he is a witness from the beginning, and we don't have to raise this privilege each time a question is asked. It is just a procedural matter. I didn't state it very clearly. But what I wanted was that the immunity attaches to Timmy Williams when he sits down in that witness stand.

• • • • •

TIMOTHY WILLIAMS

A. Apartment 12.

Q. And with whom did you live at that address?

A. My stepfather and my mother.

Q. And is your stepfather in the courtroom today?

A. Yes.

Q. Will you please point to him?

A. Julius West (indicating).

Mr. Milanowski: May the record show he pointed out the defendant, your Honor?

The Court: Very well.

Q. Who else lived with you at that address?

A. My mother, Erline West.

Q. Now, do you remember what day of the week was January 10, 1972?

A. I can't recall.

Q. Do you remember whether it was a school day, January 10?

A. Yes.

Q. Did you attend school that day?

A. No.

Q. On that day, do you recall what time you awoke?

A. No.

Q. *Do you remember whether on the morning of January 10 your stepfather, Julius West, and your mother, were also there in the apartment?*

(216) *there in the apartment?*.

A. Yes.

Q. They were?

A. Yes.

Q. *Do you recall whether sometime after 12:00 o'clock noon, whether your stepfather and mother left the apartment?*

A. *No.*

Q. They did not leave the apartment?

A. If they did, I didn't know it.

Q. Are you saying that during the morning of January 10, that they never left the apartment?

A. No, I'm not saying that, you are.

Q. *Do you know whether they left the apartment at all on January 10, whether in the morning or in the afternoon, sir?*

A. *I would rather not answer that question.*

The Court: *You will have to answer, witness, if you know.*

A. (No response)

The Court: Perhaps the Reporter should read the question.

(Last question was read back by the Reporter)

A. (No response)

Q. Do you understand the question, witness?

A. I understand the question.

Q. Do you understand the instructions just given to you by Judge Engel?

A. I do.

Q. Do you refuse to answer that question?

A. Just the answer I gave you.

The Court: Sir?

The Witness: Just the answer I gave him.

Q. But the Court has instructed you to answer.

A. I know that.

Q. But you still refuse?

A. Yes.

Q. *Let me ask you this question, did your father, stepfather, Julius West, leave the apartment some time on the morning before noon on January 10, 1972?*

A. *I cannot answer that question, either.*

Q. Mr. Williams, I am going to show you what has been marked as Exhibit Number 1 and ask you whether you have ever seen that coat before?

A. (Pause) Yes, I have seen it before.

Q. And where did you see that coat before?

A. On Pauline Rogers' back.

Q. On Pauline Rogers'—

A. Back.

Q. What were the circumstances of your seeing that coat on Pauline Rogers' back?

A. Just like I would be wearing this coat right here.

Q. Do you remember when that was?

A. No, I don't.

Q. Do you remember whether it was after January 10, 1972?

A. It was before.

Q. It was before that time?

A. (Witness nods)

Q. Do you know whether that coat ever belonged to your mother?

A. No, I don't.

Q. Mr. Williams, I'm going to show you what has been marked as Exhibit Number 2 and ask you whether you ever saw that, that Exhibit, that gun, in apartment 12 at 812 West Lenaway?

A. No, I haven't.

Q. On January 9—listen to what I say—on January 9, 1972, were you living in apartment 12 at 812 West Lenaway?

A. I was.

Q. And was Julius West living there with you?

A. Yes.

Q. Do you know whether he had a mustache and a goatee at that time?

A. I don't recall.

Q. Do you know whether he had a goatee or a mustache all the time prior to January the 10th, between the time that you lived with him in apartment 12?

A. I don't understand the question.

Q. You will not answer?

The Court: He said he did not understand it.

The Witness: I don't understand the question.

Q. Oh. I'm talking about the time—well, let me strike that. How long did you live with Julius West and your mother at 812 West Lenaway?

A. About four or five months.

Q. *During that time did Julius West have a mustache and a goatee?*

A. *I wish not to answer that question.*

Q. *I'm sorry, I didn't get your answer?*

The Court: *He said, "I wish not to answer that question."*

Mr. Milanowski: I would respectfully request the Court to order him to answer it.

The Court: Timothy, I order you to answer that question.

A. *And I wish not to answer the question. Your Honor, I wish not to answer it.*

(Government's Exhibit 13 was marked by the Reporter)

Q. Mr. Williams, I am going to show you what has been marked as Exhibit 13 and ask you whether you had ever seen that Exhibit on January 11, 1972?

Mr. Eardley: Excuse me, your Honor, I don't have a record of Exhibit 13.

The Court: It has been marked but it has not been offered nor received.

Mr. Milanowski: I am merely asking you to identify whether you had ever seen that on January 11, 1972?

Mr. Eardley: Excuse me, may I inquire what it is?

The Court: Yes. I think for purposes of identification the record should show what it is.

Mr. Milanowski: Well, your Honor, the reason why I didn't is I didn't want to take advantage of him. It is part of a wig, your Honor, part of an Afro wig.

The Court: Take a look at it.

Mr. Milanowski: You make take it apart, Tim.

The Witness: Repeat it again.

The Court: He asked you to repeat the question, Mr. Milanowski.

(By Mr. Milanowski continuing)

Q. *Okay. Did you ever see those parts of a wig on January 11, the morning of January 11, 1972?*

A. *I wish not to answer that question, either.*

Mr. Milanowski: Your Honor, I would respectfully request the Court to instruct him to answer.

The Court: Yes, I order you to answer that.

The Witness: Your Honor, I wish not to answer the question.

Q. Mr. Williams, isn't it true that you took this wig or the parts of it to your locker at Lansing Eastern High School on the morning of January 11, 1972 in your tennis shoe? Is that true, sir?

A. Yes, I did.

Q. I said "Lansing Eastern," what is the high school that you are in?

A. Eastern High.

Q. I think I said "Eastern," but I—you are saying now that you did take that to your locker at the high school?

A. Yes, I did.

Q. And what were the circumstances under which you took it to the high school?

A. I didn't know they were in my tennis shoes until I had got to school.

Q. You didn't know they were in your tennis shoes?

A. That is right.

Q. Do you know who put the parts of the wig in your tennis shoe?

A. No, I don't.

Q. What occurred sometime after the 11th, Mr. Williams, regarding those parts of the wig?

A. Repeat the question.

Q. Well, let me strike that. Did any of the FBI agents or anyone else contact you regarding this wig?

A. Yes.

Q. And when was that?

A. The night after they had "tore up our house".

Q. What did you say to them?

A. Well, they asked me—they asked me if I know anything about the bank robbery, and I asked them about my mother, and they told me that they had charged my mother with bank robbery and murder.

Q. Yes?

A. And they asked me did I know anything about the robbery, and they said if I did and they could get enough on Julius, they would convict Julius instead of my mother, and they would get my mother off.

Q. All right, and then what did you do, sir?

A. I made up a lie so that they would take my mother off, and I showed them this right here (witness indicates and then begins sobbing).

The Court: The Court will take a recess.

(A brief recess was then taken)

(Court was resumed after a 15 minute recess, the jury not yet having been returned to the courtroom)

The Court: The record should show that—

Mr. Milanowski: Did the Court want to say this outside of the jury, your Honor?

The Court: Yes, outside of the jury. The record should show that at the time of the recess the witness was weeping, and for that reason the Court sent the jury to the jury room and called a recess. It is now a quarter to 5:00, and I ask counsels' advice as to, number one, the ability of the witness to proceed at this time; and, number two, whether or not, in view of the hour, we should resume.

Mr. Milanowski: Your Honor, I would only have three or four more questions of the witness, which I think I could complete.

The Court: Mr. Eardley?

Mr. Eardley: Whatever suits the Court's convenience, your Honor.

The Court: Well, let's call the jury in.

Do you think you can go on now, Mr. Williams? How are you doing?

The Witness: All right.

(The jury was then returned to the courtroom)

(By Mr. Milanowski continuing)

Q. Mr. Williams, clarifying the question, on January 11 you were a student at Lansing Sexton High School, isn't that true?

A. Yes.

Q. And that is where you took the wig on that day, or is that the way the wig got to that school on that day?

A. Yes.

Q. It wasn't Lansing Eastern, it was Lansing Sexton?

A. Yes.

Q. And did you take the FBI agent to your locker, is that correct, sir?

A. Yes.

Q. *In the afternoon, January 10, do you remember your father coming home with a green coat that I showed you at approximately 2:30 or 3:00 o'clock?*

A. *No, I don't.*

Q. *Do you remember whether he came home at that hour on the same day, and that he was wearing a bra?*

A. *No, I don't.*

Q. *Do you recall that on that same day he went into the bedroom and he asked you unzip the bra?*

A. *No, I don't.*

Mr. Eardley: Your Honor, may we approach the bench?

The Court: Yes.

(A conference was held at the Judge's bench)

Mr. Milanowski: I have no further questions, your Honor.

Mr. Eardley: No cross-examination, your Honor.

The Court: You may step down.

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Mr. Milanowski: . . . *Now you heard the testimony of Timothy Williams, and he stated that someone put the wigs in his tennis shoes. Isn't that true? No question about that part, someone put the wig in his tennis shoes,* and when Special Agent Hildreth went on the stand, he testified that is exactly where he found those, that part of the wig. But, again, the amazing thing, it all fits in. And who do I say that? *Because even outside of that direct evidence, it seems to me, by Timothy Williams who said that someone put those in his tennis shoes when he went to school the next day, we have other supporting evidence which puts it there.* Do you remember the picture of the box and the testimony by Ken Maciejewski that he photographed a box right outside the bathroom with

particles in it that have been definitely identified as being the fibers of the wig? Can't you see how it all, one thing supports the other, there is no question about it? The wig was in the box, otherwise how could the fibers from the wig get in that box? No question that somebody tried to destroy the wig, it was cut up, yet the fibers are there and are matched without question by the experts, Mr. Bisbing, Mr. Metzger especially, who testified that they came, those fibers came from that wig.

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Also at the bank you find, what, a spent bullet—we had one spent bullet from here marked, because you will recall in the ballistics testimony Ken Maciejewski gave he used two bullets, one that he took from the victim and one that he found there, and both he matched up. Now, again, just analyze it. Then what happened, we have buttons, we have one button here at the victim; two buttons that Ken Maciejewski testified to were taken off the coat, Exhibit 1. There was no question about that. The third button was found at the apartment, or I should say fourth button, excuse me, because there were two taken off the coat, one was found on the body, and one found in the apartment, which gives us four buttons. *What about the wig? Here is the wig, and we got it—it came from the apartment, there is no question about that, is there, for two reasons? Timmy's testimony and the fact we found the*

*box with fibers.* And that was in the apartment, But on top of that we found the other clip to that earring, that is was the only one that was clean shaven. Absolutely, no question about it. And that is why we put on the last two witnesses, the two ladies that came in here, one being Mrs. Woods, who testified to that effect. You see how it is, there is an absolute perfect chain, there isn't a link that is broken in that chain. *And I'm not mentioning anything at all about Timmy Williams, you heard that testimony;*

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THE COURT: Without intending to give undue emphasis to the testimony of one witness over another, I feel it appropriate to make a few remarks about the testimony of Timothy Williams. You will remember that at the beginning of the trial, I stated that no remarks of counsel could be received by you as evidence. During his opening statement, the United States Attorney in outlining the witnesses and expected testimony, made certain remarks as to the expected testimony of Timothy Williams.

You will recall Timothy Williams testified with great reluctance and in some instances declined altogether to answer questions. While you are entitled to and should subject those matters to which he did testify to the same rules as I have already explained concerning all witnesses, and while you may consider his apparent reluctance as bearing upon his credibility and what weight you will give to his testimony this does not justify you in speculating and you may not speculate as to what his answers would have been to questions put to him where he refused to answer.

Likewise, I charge you to disregard absolutely any statement made by the United States Attorney at the beginning of the trial concerning the testimony of Timothy Williams which he did not actually testify to during the trial.

YESSICK: So the next morning we discussed the possibility of obtaining a search warrant at that time for that apartment, and *we decided that we had no basis to search that apartment on a warrant,* to obtain a warrant, *so we decided the next morning we would go interview the person and see if we could get a consent to search* for the apartment, which is what happened. We learned the next morning that Mr. Welch was on his way up, so everything—when Mr. White and some other Agents arrived there that morning at 6:30, we put them out there on the car to watch it, and sent the other Agents who had been there all night home. At approximately noon, sometime before noon that morning, we went to the apartment, at which time I remember Mr. Jackson knocking on the door of the apartment. The first time we got in there, I don't know what happened, but I believe somebody located the manager's apartment, because we had learned that he was the brother of Mr. Julius West, and we thought maybe possibly we may want to talk to him also as to the activity of Julius West. Mr. Jackson knocked on the door, and I don't remember exactly how we got in, but I know that Mr. Chuck West came up to the door before we entered, and the door was opened by Mr. West, and Mr. Jackson began talking to Mr. West and directed him, or asked him if there was some place they could talk. And *Mr. West was bent over, obviously in pain,* and he wanted to sit down, so they went to the kitchen table. There was a lady in the apartment at the time who identified herself as Tanna Ball. Tanna Ball is the stepdaughter of Mr. West and the daughter of Earline Peggy Ann West.

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JULIUS WEST: . . . I yelled, "Come in, you know. I don't guess they heard me because they kept knocking, and finally I went to the door myself, and I observed two gentlemen standing in the doorway, *one was in a crouched position with a shotgun* pointed at me, and the other was standing next to him. And I backed up away from him, you know, backed across the living room, to the middle of the living room, and

*the one with the shotgun, he searched me*, and then he told me to sit down in a chair in the corner.

Q. Do you recognize any one of these gentlemen as being the one with the shotgun?

A. The gentleman on the end, he is familiar (indicating); I mean, he is kinda hard looking in the face, but—

Q. Are you indicating the gentleman in the blue suit?

A. Yes.

Q. Special Agent Jackson?

A. Yes.

* * * * *

A. Well, no, I don't think they actually said anything about me; they just said they wanted to talk to me about it. He had asked me about searching the place first, and I told him, "Yes," *and he said that if I didn't give them permission, that they would get a search warrant and it would only take that much longer, you know. So I told them, "Yes," you know, they could search.*

Q. Did they ask anything about the car?

A. Not at that point. This—I don't think he asked me anything about the car until we got into the kitchen.

Q. All right.

A. When he started, you know, questioning me.

Q. All right. Now, there is some testimony here that he explained to you what your constitutional rights were. When did he do that?

A. Well, this was after we was in the kitchen, and, well I didn't see any papers, or anything like that, you know, until after we were almost finished talking. And when he showed the papers to me, when he give me the papers, had me sign the papers, they say—I think he was almost finished and they were about ready to leave when they gave me the papers to sign.

Q. And you were seated at the kitchen table at that time, were you?

A. Yes.

Q. And you don't recall that it was Special Agent Jackson who did this—

A. That is what I—

Q. —but somebody did, is that correct?

A. Yes, somebody did.

Q. Meanwhile, there was a search going on in the house?

A. Yes.

Q. And you had said it would be okay to search, is that correct?

A. Yes.

Q. *Why did you tell them it was alright to search?*

A. *Why did I tell them? Well, I figured he was going to do it, anyway, he's got a shotgun pointed at me, anyway, and I'm not going to argue.*

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**BILLY E. YESSICK**

thereupon resumed the stand on the Court's own motion and testified further as follows:

The Court: Mr. Yessick, did you hear the testimony of Mr. West concerning an Agent kneeling at the door with a shotgun at the time you opened it?

The Witness: I did, sir.

The Court: Would you tell me what you know about that?

The Witness: I was out in the hall at the time the entry was being made, or the knock on the door, trying to get into the apartment, *and there was an Agent with a shotgun in the hallway outside the apartment door. I didn't—I never saw this individual crouch and point this gun. I would hope that he was in a ready position, however, if I was going to enter that apartment.*

The Court: I don't care about your "hopes," I am just considering your observations.

The Witness: Okay, *I remember seeing an Agent with a shotgun there outside the door.*

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THE COURT: . . . Of course, I think I disregarded, and also the Commissioner must have, that "A" killed "B", unless the affiidavit shows that the affiant was there. This is a conclusion which obviously was a pure conclusion of the time.

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THE COURT: The Court is of the opinion, then, that *the testimony supports the voluntariness of the consent to search* to the extent that it was made, up to the time, of course, that that consent was withdrawn. I take into account the fact that there was a weapon present and that probably it was in view. I see nothing in the proofs to show any state of mind in the defendant, Julius West, which made it such he was placed in such fear or under such coercion as to make it a forced search and to take away the voluntariness. His own testimony establishes largely in substance the conversations which took place. *He understood that a search warrant would have to be obtained, and I think he knew that he could, as he later did, could refuse his consent or withdraw it, or decline altogether in the first instance.*

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YESSICK: . . . that was the apartment that we wanted to search, and this is the apartment that we knew that Mr. West resided in with his wife, Peggy Earline West. The reason I knew this is I had been in the apartment on the 11th and I knew Mr. West was there, and he indicated that he resided there. At this time we were looking for a coat and it states that we were looking for "a green and black tweed woman's coat with fur collar, a black purse, a pair of black flare pants, a part of an earring, sunglasses, hair fibers, blood specimens, a revolver, and any fruits of the robbery of the First National Bank of East Lansing, Michigan, committed on January 10, 1972." This was because at the scene of the robbery we had recovered parts of an earring, one part being a rhinestone set, which has a clamp to one ear; and tied to that was some beige thread, a large ring which I understand was a face, and this particular face had smaller rings. We found all this apparatus—

Mr. Eardley: I will object, your Honor. There is no reference to that on the affidavit that I can see. We are limiting ourselves to the contents of the affidavit. This is all that appeared before Magistrate Karr, as far as I know, and that is the only thing that is relevant here.

The Court: Well, Mr. Green, what do you have to say?

Mr. Green: Your Honor, the only reason for the detail here is in reference to what this was based on. Of course, the affidavit itself is the key part, the Government admits that. Mr. Yessick was just expanding on the matter. Mr. Yessick can, of course, limit himself to the fact that he just found a black button at the bank robbery—

Mr. Eardley: I submit, your Honor, he is required to limit himself to that. That is what is in the affidavit.

The Court: Overruled. You may answer the question. I take it this is simply, this is explanatory to the specifications of the particular evidence sought. But I recognize, of course, the fact that the judgment of the Commissioner, absent anything else, would have to be obtained from the affidavit on the sufficiency of the affidavit itself.

Mr. Green: You may proceed, Mr. Yessick.

A. This apparatus was all located, except for one rhinestone Christmas tree piece, so we were looking for that. The witness told us the robber had black flare pants, and she also, the witness being the teller, Mrs. Burnham, said the robber wore a green and black tweed coat, and sunglasses, according to the witness, and there was a revolver used. Of course, the "loot" we did not have at the time. At the scene of the bank, also there had been a man killed, and there were fibers found at the scene, according to the State Police Crime Lab, and also the teller indicated that she thought that the deceased manager had bit the man that robbed him. She was not sure, but she thought she observed at one time the hand in the man's mouth. We were looking for blood specimens, because there was a hassle, they scuffled, the manager

and the robber, and the manager was shot, and there was blood from the manager which we had hoped to find. This is the basis of what and why we put these items in the affidavit. Before this affidavit was obtained, we had talked to Earline Peggy Ann West, who did admit being at the First National Bank of East Lansing at 3332 Lake Lansing Road, Lansing, Michigan, at approximately 1:50 P.M. and she also stated she was alone and driving a 1964 Ford, bearing 1971 Michigan plates, NDF 532. I know for a fact that on January 10, 1972 the First National Bank of East Lansing, the above address, was robbed at approximately 1:50 P.M. *And at this point, according to information that we had received from other sources, we knew that Mr. Julius West had committed this crime and did shoot and kill Mr. Stanley Irish*, the bank manager. We developed neighborhood witnesses who stated that there were two people in this vehicle which was identified by Mr. Gerstenhaber. This is the '64 Ford bearing Michigan plates NDF 532. Several people at the scene of the crime indicated that two people were in this car. We also found a button at the scene of the crime in the bank, and also from the search with the consent, we had recovered another button which appeared on January 10, 1972. At this time, Julius West was wearing part of an earring and was carrying a green and black tweed woman's coat with a fur collar. He was also carrying a blue suitcase."

This person is Timothy Williams, being the stepson of Mr. Julius West, and the son of Peggy Earline West—or Earline Peggy Ann West, I'm sorry. Mr. Timothy Williams had furnished this information to us, and he had also furnished information concerning the wig that was used by Mr. Julius West, and he led us to the location of this wig. He also told us that this wig had been cut-up and the hair cut from it and flushed down the commode, and that he was told to take the wig and dispose of it. He took the wig to his locker at Sexton High School, where he placed the parts in his

tennis shoes. He went with the Agents that night, on the 12th, and recovered that wig, and we recovered the wig in the presence of Timothy Williams.

We had a second confidential informant who has been reliable in the past and who has given information which was independently verified by subsequent investigation by the FBI, who stated the money from the robbery of the First National Bank of East Lansing was placed in a record player in the bedroom and said record player was removed from the apartment on January 11, 1972.

This confidential informant is a confidential informant of the Lansing Police Department who Detective Sergeant Fox told me the individual has furnished reliable information in the past to him on several occasions, and that he has contacted this individual for a number of years. He also told me that he has made several arrests as the informer has told wheer various persons for whom the Police Department had warrants were located, where they could be located, and he also told us that the money was in the record player in the bedroom of the apartment on January 11. And on this basis we obtained this affidavit for a search, in order to look for this coat, part of the earring, and the other items which were mentioned in this affidavit.

Mr. Green: I have no other questions, your Honor.

**FURTHER EXAMINATION OF YESSICK**

BY MR. EARDLEY:

Q. What is the name of this second confidential informant?

A. I am not able to give that name.

Q. You don't know it?

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Q. *There are not any facts in this affidavit that as of the time the affidavit was filed you knew of your own knowledge, are there?*

A. No, sir.

Q. And did you know that *Timothy Williams had never been an informant for the FBI or anybody else* prior to your involvement with him or somebody's involvement with him in this case?

A. *I know that he wasn't an informant for the FBI. I would suspect he was not an informant for anyone else.*

Q. So when you talk about a confidential informant who has been reliable in the past, you are talking about someone else, are you not?

A. Yes.

Mr. Eardley: That is all I have. No other questions.

Mr. Green: I have no other questions.

The Court: Well, you knew about the button?

The Witness: About the button found at the scene and the one recovered from the apartment, yes, sir, I knew about that.

**WITNESS FOX: . . .**

A. No, sir.

Q. Does he claim to have seen the money put in the record player?

A. He didn't specifically answer that when I asked him. I said to him, "How do you know for a fact the money is there," and he said, "Fox, believe me, it is there." He says, "It is there right now."

Q. Somebody told him?

A. He didn't tell me.

Mr. Eardley: That is hearsay piled upon hearsay, as far as I am concerned, your Honor. I have no further questions.

Mr. Green: The Government has no further questions.

**CROSS-EXAMINATION OF PAULINE ROGERS**

BY MR. EARDLEY:

Q. How long have you been living with Chuckie, Mrs.

Rogers?

A. Hmm—about four years.

Q. As his common law wife?

A. Yes.

Q. Do you have any children by Chuckie?

A. No, I don't.

Q. Do you have any children by anybody?

A. Yes, I do.

Q. How many children do you have?

A. I have one.

Q. And how old is he?

A. Sixteen.

Q. And is he by your first husband, Mr. Rogers?

A. No.

Q. Were you married to your child's father?

A. No, I am not.

Q. Now, you have been living with Chuckie as his wife for all practical purposes, haven't you?

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Q. Was it last month?

A. No.

Q. The month before?

A. No.

Q. The month before that?

A. No.

Q. Were you using it at the time of the bank robbery?

A. What do that have to do with this here case? What do this have to do with this case?

Q. Would you just answer my question, please?

A. Now, you tell me that—

Q. Would you answer my question, please. Were you using heroin at the time of this bank robbery?

A. (No response)

Mr. Eardley: Your Honor, would you direct the witness to answer, please.

to do with this case, about what I do (speaking to the Court)?

The Court: You should answer.

A. Ya.

Q. You never had much to do with Julius and Peggy West, did you?

A. No.

Q. They didn't like you or you didn't like them, or was it both?

A. Well, the way I got it, they didn't care that much for me.

Q. Now, you do know, do you not, Mrs. Rogers, that the money that was stolen from this bank robbery has not been recovered yet?

A. That is what they tell.

Q. You know that, don't you?

A. Yes.

Q. Because the FBI has told you that?

A. Yes.

Q. And they keep coming back to you and asking if you know anything about it?

A. Yes, they comes and talks with me.

Q. And you knew that the six or seven hundred dollars that you claim you spent belonged to the loot that was taken at the bank, did you not?

A. I spent it. At the time I didn't care, really.

Q. You didn't care where it came from, is that right?

A. It was dropped and I picked it up and I spend it. I didn't steal it.

Q. And you told the FBI that you spent it?

A. I told them, yes, I told them.

° ° ° ° °

**RECROSS-EXAMINATION OF PAULINE ROGERS**

BY MR. EARDLEY:

Q. I have one or two questions. It was Chuckie's gun, was it not?

A. Yes, it was.

Q. And when Chuckie came back from apartment 12, he had the gun, did he not?

A. Yes, he did.

Mr. Eardley: That is all.

Mr. Milanowski: That is all.

The Court: I have no questions. You may step down.

(Witness stepped down)

**CROSS-EXAMINATION OF LARRY GERSTENHABER**

BY MR. EARDLEY:

Q. Mr. Gerstenhaber, did you view a line-up?

A. No, I did not.

Q. *Have you ever seen the defendant, Julius West, before–*

A. *No.*

Q. *–his appearance in this courtroom?*

A. *No.*

**CROSS-EXAMINATION OF TERRY BOUCK**

BY MR. EARDLEY:

Q. Mr. Bouck, have you ever seen the defendant, Julius West, prior to seeing him in this courtroom today?

A. I have not.

Mr. Eardley: I have no further questions.

* * * * *

PAT LUTOMSKI: A. They wanted me to identify the car.

Q. Where did you identify it, sir?

A. They took me over in Lansing at the apartment and they showed me the car.

Q. And did you inspect the automobile?

A. Yes, I did.

Q. What was it, what inspection did you make there at the apartment?

A. I just looked it over. I could tell it was the car, you

know, looked at the hood and looked at the radiator, and it was the same car.

Mr. Milanowski: I have no further questions.

### CROSS-EXAMINATION OF PAT LUTOMSKI

BY MR. EARDLEY:

Q. Have you ever seen the defendant, Julius West, prior to this appareance in Court?

A. Not that I know of.

Mr. Eardley: That is all.

* * * * *

### CROSS-EXAMINATION OF MRS. REEVES

BY MR. EARDLEY:

Q. I have just one question, Mrs. Reeves. Have you ever seen Julius West who is seated at my left here before today?

A. I don't know.

Q. Do you think you might have?

A. I may have.

Q. Where would you have seen him?

A. Any place in East Lansing, any number of places.

Q. Do you recognize him as being the person you assumed was a lady in the passenger seat of the car in question?

A. No, I can't say that I do.

* * * * *

BY MR. EARDLEY:

Q. Mrs. Burnham, this is a very important question. Can you sit there on that witness stand and say that you have ever seen the defendant, Julius West, before?

A. Yes, I saw him on TV; I saw his pictures in the paper;

I saw him in the line-up.

Q. *Did you see him that day at the bank?*

A. *I can't be sure, no.*

Mr. Eardley: That is all.

• • • • •

Mr. Eardley: Your Honor, at this time I move for a mistrial, on the grounds that the United States Attorney in his opening statement to the jury gave a rather vivid description of what witness Timothy Williams would be testifying to in this Court. If the jury has any recollection at all of the advice given by counsel as to what he would testify to, it is so incriminating, in my judgment, as to be impossible of correction by this Court. The testimony of Timothy Williams, as the Court well-knows, did not come as promised, and I know why he did not, and I am in sympathy with the Government's position in that regard, but the defendant had nothing whatever, of course, to do with that. The fact is, I think his rights have been prejudiced by counsel's opening statement. I think it is virtually impossible for this Court to correct it by any corrective instruction, and I believe the prejudice is so severe and critical as to be grounds for a mistrial.

• • • • •

The Court: I believe that this matter can be cured by instructions, and I shall confer with counsel concerning this, taking into account that unlike many cases it was not deliberately asserted.

The motion is denied, that is, tht motion for mistrial is denied; and the motion for a directed verdict of acquittal is likewise denied. There appears to be ample evidence to support a verdict of the jury at least on two counts, if the jury sees fit to do so, based upon the law that I shall give them and the facts as they find them.

## APPENDIX C

AFFIDAVIT FOR SEARCH WARRANT

**United States District Court**

for the

Western District of Michigan, Southern Division

United States of America
vs.
Julius West,
Earline Peggy Ann West,
and Charles Edward West

Affidavit for
Search Warrant

Before: Stephen W. Karr, 880 Union Bank Building, Grand Rapids, Mich.

The undersigned being duly sworn deposes and says:

That he is positive that (on the premises known as) 812 West Lenawee, Lansing, Michigan, Apartment #12, in Southeast Corner of 2nd Floor – 3-Story Apartment Building on North side of street in the Southern Division in the Western District of Michigan there is now being concealed certain property, namely a green and black tweed woman's coat with fur collar, a black purse, a pair of black flair pants, a part of an earring, sunglasses, hair fibers, blood specimens, a revolver, and any fruits of the robbery of the First National Bank of East Lansing, 3332 Lake Lansing Road, Lansing, Michigan, committed on January 10, 1972, which are believed to be in an Apartment #12, 812 West Lenawee, Lansing, Michigan.

And that the facts tending to establish the foregoing grounds for issuance of a Search Warrant were as follows:

The fact that Earline Peggy Ann West did admit to being at the First National Bank of East Lansing, 3332 Lake Lansing Road, Lansing, Michigan, at approximately 1:50 p.m. and she also stated she was alone and driving a 1964 Ford, bearing

1971 Michigan Plates NDF 532.

On January 10, 1972, the First National Bank of East Lansing, 3332 Lake Lansing Road, Lansing, Michigan, at approximately 1:50 p.m. was robbed by Julius West, who during the commission of such robbery did shoot and kill one Stanley T. Irish, Bank Manager.

The complaint is also based on information furnished by several witnesses who state two persons were in the above vehicle at the above bank at approximately 1:50 p.m. on January 10, 1972.

A button found at the scene of the above crime on the floor near the body of Irish matched a button found at the apartment of Earline Peggy Ann West and Julius West—Apartment 12, 812 West Lenawee, Lansing, Michigan.

A confidential informant, who has been reliable in the past and who has given information which was independently verified by subsequent investigation by the FBI, stated that he observed Julius West entering his apartment (#12) with his wife, Earline Peggy Ann West, located at 812 West Lenawee, Lansing, Michigan, at approximately 2:30 p.m. January 10, 1972. At this time, Julius West was wearing part of an earring and was carrying a green and black tweed woman's coat with a fur collar. He was also carrying a blue suitcase.

A second confidential informant, who has been reliable in the past and who has given information which was independently verified by subsequent investigation by the FBI, stated the money from the robbery of the First National Bank of East Lansing, was placed in a record player in the bedroom and said record player was removed from the apartment on January 11, 1972.

Billy R. Yessick
Special Agent, FBI

Sworn to before me, and subscribed in my presence January 13, 1972.

Stephen W. Karr,
United States Magistrate

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Supreme Court, U. S.
FILED
APR 16 1974
MICHAEL RODAK, JR., CLERK

# In the Supreme Court of the United States

OCTOBER TERM, 1973

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JULIUS WEST, PETITIONER

*v.*

UNITED STATES OF AMERICA

---

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT*

---

## BRIEF FOR THE UNITED STATES IN OPPOSITION

---

ROBERT H. BORK,
*Solicitor General,*

HENRY E. PETERSEN,
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JEROME M. FEIT,
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*Washington, D. C. 20530.*

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# In the Supreme Court of the United States

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## BRIEF FOR THE UNITED STATES IN OPPOSITION

---

### OPINION BELOW

The opinion of the court of appeals (Pet. App. A) is reported at 486 F.2d 468.

### JURISDICTION

The judgment of the court of appeals was entered on October 31, 1973. Mr. Justice Stewart extended the time for filing a petition for a writ of certiorari to December 31, 1973, and the petition was filed on

January 2, 1974, the first day the Court was open after December 30, 1973. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## QUESTIONS PRESENTED

1. Whether petitioner was denied a fair trial when the United States Attorney outlined in his opening statement the expected testimony of a witness who thereafter did not testify to many of the details which had been expected, where the jury was cautioned by the government attorney and the trial judge that statements made by the government attorney were not evidence and should be disregarded.

2. Whether petitioner was prejudiced when the United States Attorney recalled this witness to the stand after obtaining transactional immunity for him and asked certain questions based on a statement made by the witness to federal agents and where the defense did not cross-examine the witness.

3. Whether evidence admitted against petitioner at trial was seized as a result of two illegal searches.

## STATEMENT

After a jury trial in the United States District Court for the Western District of Michigan, petitioner was convicted of bank robbery by force and violence, bank robbery by assaulting and killing a bank employee, and use of a firearm to commit a felony, in violation of 18 U.S.C. 2113(a), 2113(e), and 924(c)(1). He was sentenced to twenty years' imprisonment and fined $5,000 on the first count,

life imprisonment on the second count, and ten years' imprisonment on the third count, the sentences to run concurrently. The court of appeals affirmed in a comprehensive opinion (Pet. App. A).

1. The evidence, which is set forth in the opinion of the court of appeals (Pet. App. A, 53-58, 61), established that on January 10, 1972, the First National Bank of East Lansing, Michigan, was robbed by a male posing as a female, wearing a black and green coat and an "Afro" wig. The bank manager struggled with the robber in an attempt to prevent the robbery, and was fatally shot. During the struggle, a button was torn off the black and green coat, and an earring and part of another earring were pulled from the robber's ears; these were later found by police at the scene of the struggle (T. 187-189).[1]

Petitioner's sister-in-law testified that, on the evening after the robbery, petitioner boasted that he and his wife had robbed the bank and that he had shot a man five times; she stated that petitioner was holding a large number of $50 bills and bills of other denominations. Petitioner told her that he had been dressed as a woman, wearing a "natural" wig, earrings, a coat, and other women's clothing.

Petitioner's sister-in-law also identified a revolver as being her husband's, but stated that petitioner had access to the gun. After the robbery she had been given the gun by her husband and arranged to have it buried; the gun was recovered by the Federal

[1] "T." refers to the trial transcript.

Bureau of Investigation, and ballistics tests established that the bullet removed from the body of the slain bank manager had been fired from that gun.

Petitioner's sister-in-law also testified that the day after the robbery petitioner's wife gave her a coat similar to the one worn by the robber; this coat was eventually turned over to the F.B.I. Laboratory tests revealed that a hair fiber found on the coat matched hair from the head of petitioner (T. 306-307), and that two hairs found on the coat matched hair obtained from the head of the slain bank manager (T. 308, 325). Also, fibers from the coat matched fibers found in the bank manager's tie clasp and on his clothing.

Several witnesses observed a car, later identified as being registered to petitioner's wife, in the vicinity of the bank around the time of the robbery. One witness saw the car parked on the bank parking lot; a woman was standing outside, and a person who the witness thought was a woman was seated inside. Other witnesses saw the same car with two Negro occupants wearing "Afro" hair styles.

About five months or so before the robbery, in a conversation with his brother-in-law, petitioner said that the East Lansing bank would be easy to rob because it was located in a secluded place; they discussed the feasibility of a male robber disguising himself as a woman. Petitioner customarily wore a moustache and goatee, but the day before the robbery he was clean-shaven. In addition, a fellow inmate testified that petitioner, while he was in custody await-

ing trial, told him that "they could not prove it was me because nobody could identify me."[2] Finally, petitioner's stepson testified that the day after the robbery he found, hidden inside his tennis shoes, a wig, which he later turned over to the F.B.I. and which was proven at trial to have been connected with the bank robbery.

2. Two searches of petitioner's apartment led to the seizure of evidence which was introduced against him at trial. The first, which the government contended was a valid consent search, yielded a spool of thread similar to the thread used to make the earrings found in the bank, and a button which matched those on the coat later received from petitioner's sister-in-law. The second search, conducted pursuant to a warrant, yielded a rhinestone Christmas-tree shaped ornament which matched the earrings found in the bank, and the black fibers which matched fibers on the coat and fibers from the wig petitioner's stepson had found.

3. Petitioner denied committing the robbery, claiming he had remained home alone that day, in pain from an arthritic spinal condition (T. 395-396). He stated that his wife's green and black coat had been stored in the basement of the apartment building (T. 415-416). Petitioner admitted shaving off his moustache and goatee prior to the date of the robbery, but stated he did this because he had ruined

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[2] It is not surprising that none of the witnesses could identify petitioner at trial or at pre-trial proceedings, in view of the fact that the robber wore an elaborate disguise.

the moustache accidentally while trimming it (T. 414). He further admitted that the car in question was registered to his wife, but stated that it actually belonged to his brother-in-law (T. 414-415).

## ARGUMENT

1. Petitioner contends that he was denied a fair trial when the prosecutor outlined in detail in his opening statement the expected testimony of petitioner's stepson, Timothy Williams, who thereafter did not testify to many of the details which had been expected, even though the jury was cautioned that statements made by the government attorney were not evidence and should be disregarded. He contends further that such prejudice was compounded when the prosecutor recalled Williams to the stand after obtaining transactional immunity for him, and asked certain questions based upon a statement the witness had made to the F.B.I., some of which Williams still refused to answer. These contentions are without merit.

The facts relating to these issues are set forth in the opinion of the court of appeals (Pet. App. A, 57-59). In his opening statement the prosecutor outlined the evidence he expected from his witnesses and included a summary of evidence he expected from petitioner's stepson. He said he expected the stepson to testify that he did not attend high school classes on the day of the robbery, that he was home when his stepfather and mother arrived, that his stepfather was dressed like a woman, that his stepfather asked

his mother if they had obtained any "ones," and that he helped unfasten a brassiere his stepfather was wearing. Williams had earlier given a statement substantially to this effect to F.B.I. agents (T. 193-196),[3] and he was expected to testify at trial (T. 197). When he was first called as a witness Williams refused to testify. Because of his youth the court appointed counsel to represent him and, based on his invocation of his Fifth Amendment privilege, he was later granted transactional immunity. When he was recalled to the stand, Williams stated that he preferred not to answer, or did not recall the answer to, most of the questions asked by the government, but he did testify that he found part of a wig hidden inside his tennis shoes the day after the robbery. He testified that he later gave the wig to the F.B.I., but that he did not know who had put the wig into his tennis shoes.

At the outset, we point out that petitioner is not well-situated to complain about the procedures followed regarding the testimony of his stepson, because, as we note in the margin,[4] the problems were apparently caused by petitioner's own wrong-doing. In

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[3] The statement was read into the record out of the presence of the jury.

[4] On the second day of the trial the United States Attorney, Mr. Milanowski, stated to the trial judge, out of the hearing of the jury (T. 136):

> I just have information from an F.B.I. Agent who interviewed Timmy Williams that Timmy told him some other party advised him that Julius West was going to use the money which he took from the bank as a method

any event, should the Court deem it proper to consider these issues, we contend that the actions taken by the prosecutor were entirely proper and do not require further review.

a. Petitioner's contention that he was deprived of a fair trial by the prosecutor's outline of expected testimony, not all of which was forthcoming, was thoroughly answered in the following portion of the opinion of the court of appeals, upon which we rely (Pet. App. A, 59-61; 486 F.2d at 471-472):

> At the outset, we observe that this is not a case where an inflammatory opening statement was made to poison the minds of the jury against a defendant or to destroy his credibility before any evidence should be presented. *Cf. United States* v. *Signer*, 482 F.2d 394 (6th Cir., 1973).

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of hiring other people to kill Timmy Williams in the event that he would testify.

This was corroborated by one of Williams' appointed counsel who stated (T. 137):

> Tim has a number of concerns about his testimony. He has indicated to Mr. Quist and to myself that one of the primary concerns is some threat made against him. But he has not indicated to us the source of this threat or reported its exact nature.

Insofar as the problems regarding Timothy Williams' testimony were primarily due to threats made against the witness on behalf of petitioner, this Court would be justified in refusing to hear petitioner's complaints. "The Constitution does not guarantee an accused person against the legitimate consequences of his own wrongful acts." *Reynolds* v. *United States*, 98 U.S. 145, 158. See also *Motes* v. *United States*, 178 U.S. 458, 471-472; *Douglas* v. *Alabama*, 380 U.S. 415, 420.

Nor is it a case where the prosecution made an opening statement in bad faith without any reasonable expectation of presenting the promised evidence. *See San Fratello* v. *United States* 340 F.2d 560 (5th Cir. 1965). And it is not a case where a prosecutor, in his questioning of a witness who claimed his privilege against self-incrimination, employed improper examination techniques such as reading the entire transcript of an FBI interview to see whether the witness would contradict it, *United States* v. *Compton*, 365 F.2d 1 (6th Cir. 1966); or persistently asking the same questions that had been repeatedly answered in the negative, *Jones* v. *United States*, 119 U.S. App. D.C. 213, 338 F.2d 553 (1964); or prefacing questions with the inquiry "did you tell me" in such a manner as to place in issue the prosecutor's credibility, *United States* v. *Puco*, 436 F.2d 761 (2d Cir. 1971). Here appellant does not accuse the prosecution of any misconduct and we find none.

Appellant contends, nonetheless, that error was committed because the opening statement placed before the jury the testimony of Timothy Williams, testimony that appellant could not test by cross-examination because the witness refused to be examined on the critical matters related. Accordingly, he claims his constitutional right to be confronted by the witnesses against him was abridged. *See Douglas* v. *Alabama*, 380 U.S. 415, 85 S. Ct. 1074, 13 L.Ed.2d 934 (1965).

However, we determine that the facts in this case bring it within the rule of *Frazier* v. *Cupp*, 394 U.S. 731, 89 S. Ct. 1420, 22 L.Ed.2d 684 (1968), instead of that enunciated in *Douglas*, *supra*, where under guise of cross-examination,

and despite the refusal of a witness to answer, the prosecution read, in the presence of the jury, the witness's confession that implicated the defendant and then proceeded to authenticate the confession, although it was never introduced in evidence, by the testimony of three law enforcement officers. In *Frazier* v. *Cupp*, it was held that no deprivation of the right of confrontation results when a prosecutor sets forth in his opening statement a summary of the testimony he expects, in good faith, from a witness who later declines to testify, when the summary is not emphasized in any particular way, takes only a few minutes to recite, and is sandwiched between a summary of other evidence the prosecution expects to introduce. In this appeal, Williams' testimony was not isolated in the opening statement but, instead, was an integrated part of a statement that fairly summarized all the evidence, circumstantial and direct, that the prosecution intended to present to prove the crimes charged in the indictment. And, as in *Frazier* v. *Cupp*, the district court advised the jury that the opening statement, as the United States attorney also declared, is not evidence and should not be so regarded.

Another factor not to be overlooked in this case is that Williams was called as a government witness and did in fact testify, although his direct testimony was limited by his professions of lack of memory and by his declining to answer significant questions. Also not to be overlooked is the fact that Williams was offered for cross-examination, a right the defense declined to exercise.

> We observe, however, that this case alerts us to the potential danger presented by a too-detailed opening statement. If a failure of proof should occur, the jury in its deliberations might consider, as if it had been given, the testimony it was told to expect from a witness even though that witness did not testify. And if a court apprehends a substantial danger of a jury's doing so, the prosecution risks a mistrial or reversal of a conviction. Here, we are satisfied that the prosecutor did not overstep the line drawn by *Frazier*, and did everything he could after the opening statement to prevent prejudice in this respect. He obtained an order of immunity to require the witness to testify and he could have insisted on the witness answering his questions. That he and the court did not follow this course may have been because Williams' lawyer and the prosecutor disclosed that the boy had been threatened by appellant in an effort to seal his lips. A careful review of the entire record convinces us that no error was committed with respect to the opening statement and the testimony of Timothy Williams.

b. Petitioner's related claim that he was deprived of a fair trial when the prosecutor called Timothy Williams the second time, allegedly knowing that he would not testify, is answered by the fact that the witness did testify to at least one fact pertinent to the robbery, namely, that he found a wig connected with the robbery in his tennis shoes. Even if the witness had not testified, however, it would not have been error to call him to the stand where

the prosecutor had an honest belief that the witness had information pertinent to the issues in the case and where his action in calling the witness was done in good faith. See *Frazier* v. *Cupp*, 394 U.S. 731, 733-737; *Namet* v. *United States*, 373 U.S. 179; *United States* v. *Compton*, 365 F.2d 1, 5 (C.A. 6), certiorari denied, 385 U.S. 956. Here the witness was called in the honest expectation that he would testify to matters pertinent to the robbery, and he did testify to one such matter.

Petitioner contends, however, that "the United States Attorney's questions to [Williams] * * * clearly brought to the attention of the jury the elements of his statement [to the F.B.I.] which had been outlined in the opening statement" (Pet. 28). An analysis of the complete testimony of Timothy Williams (T. 214-226) shows that only five of the many questions asked by the prosecutor could have possibly led the jury to believe the questions were based on a statement to the F.B.I. The remaining questions were related to other testimony which was adduced at trial and would not have led the jury to infer the existence of a statement.

The first question was whether he had attended school the day of the robbery, and Williams answered he had not (T. 215). The second related to the concealment of the wig, and Williams testified how he found the wig and what he did with it (T. 220-222, 224-225). Of these two questions, the first was innocuous, and the second subject to cross-examination, although petitioner's counsel chose not to cross-

examine the witness. The last three questions about the coat and brassiere (T. 225) admittedly could have related to the statement made to the F.B.I.[5] However, the witness did not refuse to answer these questions; he stated that he did not remember if his stepfather came home with the coat, or if he was wearing a brassiere, or if the witness helped him unzip the bra. Certainly the statement of the witness that he did not remember if an event happened would not be taken by the jury as an assertion that the event did happen.

As for the possibility that some members of the jury remembered that the prosecutor had mentioned something about the event in his opening statement, the prosecutor himself told the jury in summation that what he said was not in evidence, and that only "what you heard the witnesses themselves say" was evidence (Tr. 487). This was further emphasized by the court's instructions to the jury, which stated (Tr. 546-547):

> You will remember that at the beginning of the trial, I stated that no remarks of counsel could be received by you as evidence. During his opening statement, the United States Attorney in outlining the witnesses and expected testimony, made

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[5] It was not error for the prosecutor to ask these questions. Because the witness answered the question about the wig, it was reasonable for the prosecutor to believe that the witness had overcome his fear and was willing to testify as to other matters within his knowledge.

certain remarks as to the expected testimony of Timothy Williams.

* * * *

[y]ou may not speculate as to what his answers would have been to questions put to him where he refused to answer.

* * * I charge you to disregard absolutely any statement made by the United States Attorney at the beginning of the trial concerning the testimony of Timothy Williams which he did not actually testify to during the trial.

We believe the United States Attorney and the trial judge did all that could be expected and successfully protected petitioner.

2. Petitioner contends that evidence was seized as a result of two illegal searches.

a. As to the first search, the day after the robbery approximately seven law enforcement officers went to petitioner's apartment, accompanied by his brother (Supp. T. 10, 19).[6] One of the agents had a shotgun which was probably visible to petitioner,[7] although an agent who was present testified that he had not seen the gun pointed at petitioner, as peti-

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[6] "Supp. T." refers to the transcript of the pre-trial motion to suppress.

[7] It is understandable that one of the agents carried a shotgun, and it was probably prudent to carry it so that petitioner could see it. Petitioner was a suspect in a vicious bank robbery during which a man had been murdered with a pistol; the danger to the agents was obvious. By keeping the gun visible, the agents may have avoided a violent reaction by petitioner to their presence.

tioner had testified (Supp. T. 74-75).[8] At the time, petitioner was in the apartment with a number of people; he agreed to an interview and was orally advised of his constitutional rights, which he said he understood, and he signed a printed waiver-of-rights form (Supp. T. 11-12, 35). The agent also asked petitioner if he would consent to a search of his premises. Petitioner consented because he said he had nothing to hide and wanted to get the matter straightened out (Supp. T. 12). Petitioner also executed a written consent form for the search (T. 404; Supp. T. 15).[9] After about fifteen minutes, the search was terminated upon demand by petitioner (Supp. T. 13).

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[8] Petitioner testified that the shotgun was pointed at him when the agents came to the door (Supp. T. 57) and in the petition he takes this as established fact (Pet. 40); the court of appeals seems to have assumed arguendo that this was true (Pet. App. A 62). It should be noted, however, that the trial court found only that "there was a weapon present and that probably it was in view" (Supp. T. 78), and did not find that it was pointed at petitioner.

[9] Petitioner testified that the agent stated he would get a warrant if he did not consent to the search (Supp. T. 59) and the petition takes this as established fact (Pet. 40), although one of the agents testified that he did not hear any such statement made to petitioner (Supp. T. 55), and the trial court did not make any finding on this matter. The court of appeals seems to have assumed *arguendo* that the statement was made, and further stated that the agents' request for a search warrant had just been denied by a magistrate (Pet. App. A 62). This latter statement has no support in the record and is not even claimed by petitioner. Perhaps the error is due to a statement in the record that the agents called the United States Attorney, Mr. Milanowski, who said he thought they did not have enough evidence to get a search warrant (Supp. T. 54).

The evidence clearly indicates a valid consent search. The trial court found that (Supp. T. 78):

> the testimony supports the voluntariness of the consent to search to the extent that it was made, up to the time, of course, that that consent was withdrawn. I take into account the fact that there was a weapon present and that probably it was in view. I see nothing in the proofs to show any state of mind in the defendant, Julius West, which made it such he was placed in such fear or under such coercion as to make it a forced search and to take away the voluntariness. * * * He understood that a search warrant would have to be obtained, and I think he knew that he could, as he later did, could [*sic*] refuse his consent or withdraw it, or decline altogether in the first instance.

If, as petitioner states, he had been intimidated by the sight of the gun, or if he had been led to believe it was useless to refuse consent, he certainly would not have demanded that the officers leave the apartment after fifteen minutes, while they were still searching. Petitioner's actions belie his contention. *Schneckloth* v. *Bustamonte*, 412 U.S. 218.

b. The second search was pursuant to a search warrant. Two days after the consent search, an F.B.I. agent appeared before a United States Commissioner and submitted an affidavit for a search warrant for the residence of petitioner and his wife (Pet. App. C, 99-101). This affidavit stated in pertinent part that the bank had been robbed three days earlier and the manager killed, that petitioner's wife admitted

being at the bank in her car at the time of the robbery, that several witnesses had seen two persons in her car at about that time, and that a button found near the body of the dead manager matched a button found at the premises of petitioner and his wife, the premises to be searched (this button had been found during the consent search). Accordingly, even without reference to the information given by the informants, of which petitioner complains (Pet. 46-49), there was sufficient evidence to support the Commissioner's finding that there was probable cause to believe evidence from the robbery might be found at the apartment. See, *e.g.*, *United States* v. *Ventresca*, 380 U.S. 102.

c. The court of appeals did not decide the issue of the validity of the searches because it found that "the evidence obtained from them, considered in the light of the other overwhelming proof of guilt, did not affect the verdict," and that "any error resulting from the admission of this evidence is harmless beyond a reasonable doubt" (Pet. App. A, 62). Although we believe the searches were valid, we agree that, in light of the other evidence, the evidence taken in the searches did not affect the verdict. The government had introduced a confession by petitioner to his sister-in-law, an incriminating statement to a fellow inmate, a discussion with his brother-in-law about the possibility of using the very plan which was later used, the presence of petitioner's hair on a coat on which hair of the dead bank manager was also found, a wig which had been hidden in his stepson's tennis

shoes, and the fact that petitioner's wife's car was seen near the bank at the time of the robbery. Compared to this overwhelming evidence, the button, thread, wig fibers, and ornament found in the searches were insignificant. *Brown* v. *United States*, 411 U.S. 223, 231-232; *Chapman* v. *California*, 386 U.S. 18, 22.

## CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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